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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

FMC,

Petitioner,

v.

SHOSHONE-BANNOCK TRIBES, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an Indian tribe have authority to compel a non-Indian operating a plant on non-Indian fee land within an Indian reservation to award 75% of available positions for new hires and 100% of available promotions to Indians merely because the non-Indian has entered into mineral leases with the tribe on another portion of the reservation?

2. Does Article III of the United States Constitution entitle a non-Indian litigant challenging tribal civil jurisdiction to a *de novo* federal judicial review of a tribal court decision upholding tribal jurisdiction?

PARTIES TO THE PROCEEDING

Petitioner, FMC Corporation, is a Delaware corporation with its principal place of business in Illinois. FMC's subsidiaries include: FMC do Brasil S.A., FMC Mid-Atlantic Investments Limited, Mid-Atlantic Acceptance Company Limited, FMC Gold Company, FMC Paradise Peak Corporation, FMC Jerritt Canyon Corporation, Meridian Gold Company, FMC International, A.G., FMC Wyoming Corporation, Foret, S.A.

Respondents are the Shoshone-Bannock Tribes, federally recognized Indian tribes residing on the Fort Hall Reservation in Idaho; the Shoshone-Bannock Tribes Tribal Employment Rights Commission (aka TERO Commission); the individual TERO Commissioners, Arnold Appenay, Al Timsanico, Marvin Osborne, R. Willis Dixey; the Shoshone-Bannock Tribal Court; and individual judges of the Shoshone-Bannock Tribal Court, Honorable Charles H. Lohah, and Honorable Robert Gonzales. The Native American Rights Fund appeared as amicus in the Ninth Circuit Court of Appeals.

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SHOSHONE-BANNOCK TRIBES, ET AL.,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner FMC respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 18, 1990. FMC's petition for rehearing was denied on October 24, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 905 F.2d 1311 (9th Cir. 1990), and is reprinted in the Appendix to this petition at App. 1.

The opinion of the District Court is unreported, but is reprinted in the Appendix to this petition at App. 11.

The memorandum opinion and order of the Shoshone-Bannock Tribal Court, Appellate Division, is unreported, but is reprinted in the Appendix to this petition at App. 26.

The order and compliance plan of the Shoshone-Bannock Tribal Court, Appellate Division, is unreported, but is reprinted in the Appendix to this petition at App. 47.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued an opinion reversing the District Court's decision and remanding the case to Tribal Court on June 18, 1990. App. 1. On October 24, 1990, the Court of Appeals for the Ninth Circuit entered an order denying FMC's timely filed petition for rehearing and rejecting FMC's suggestion for rehearing *en banc*. App. 54. Jurisdiction in the District Court existed pursuant to 28 U.S.C.A. § 1331 (West Supp. 1990). App. 16. Petitioner FMC invokes this Court's jurisdiction to review the Ninth Circuit's opinion and judgment pursuant to 28 U.S.C.A. § 1254(1) (West Supp. 1990).

STATUTES, TREATIES, ORDINANCE AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 3, § 1 of The United States Constitution:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

1868 Fort Bridger Treaty, 15 Stat. 673. App. 91.

Tribal Employment Rights Ordinance, EMPT-80-S4, July 22, 1980. App. 56.

STATEMENT OF THE CASE

FMC, since 1949, has owned and operated an elemental phosphorus plant on the Fort Hall Indian Reservation in southeastern Idaho. App. 28. The plant is located at the edge of, but within the exterior boundary of the Reservation, on land owned in fee by FMC. The plant is surrounded by some 1000 acres of Reservation land owned in fee by FMC and some 1300 acres of land, also owned by FMC, which is off the Reservation. App. 12.

The plant facility consists of four huge electrical furnaces and associated equipment and buildings which produces liquid elemental phosphorus from phosphate shale. FMC has invested millions of dollars in the plant. The assessed value for tax purposes was $47,000,000 in 1985.

The phosphate shale is mined by a contractor, J.R. Simplot Co., on land owned by the Shoshone-Bannock Tribes and individual Indians within the Reservation. App. 12. The mine is located several miles from the plant and the phosphate shale is shipped by rail from the mine to the plant. App. 22.

FMC has entered into a series of leases with the Tribes and individual Indians which authorizes the mining of phosphate shale in exchange for the payment of substantial royalties. App. 12, 21. In 1986 the gross royalty received by the Tribes from the mine amounted to $2,136,059.11.

As of August, 1989, FMC employed 578 individuals, of which 56 were Indians. App. 3, 20.

On July 22, 1980 the Tribal Business Council adopted a Tribal Employment Rights Ordinance (TERO) which was reviewed and approved through the Department of Interior. App. 3. TERO requires employers located on the Reservation to give an absolute preference to Indians in all aspects of employment, contracting and subcontracting. App. 12. Section 4.3, for example, requires that "each employer must give preference to qualified Indians in all hiring and employment on the Reservation." App. 69. Section 4.5 imposes a similar requirement for promotions. App. 74. Section 4.6 provides:

> [N]o Indian employee shall be terminated as a result of layoff or reduction in force if a non-Indian employee in the same job classification is still employed; the non-Indian must first be terminated if the Indian possesses the threshold qualifications for the job classification. App. 75.

When notified of the TERO, FMC advised the Tribes it was unworkable. App. 3, 48. The Tribes agreed and in 1981, entered into an employment agreement with FMC which required FMC to give preference to qualified Indian-owned businesses in contracting. App. 13, 41. The employment agreement did not require "preference" with regard to employment, but instead required only that FMC consider qualified Shoshone-Bannock Indian applicants in hiring. App. 13.

In January 1987, the Tribes unilaterally cancelled the employment agreement. App. 14. In April 1987, the Tribes brought suit against FMC to enforce TERO through the Tribal Court. App. 14-15. FMC then commenced this action in the United States District Court for the District of Idaho challenging the Tribes' jurisdiction to enforce TERO against it. The District Court had jurisdiction pursuant to 28 U.S.C.A. § 1331 (West Supp. 1990). App. 16. The District Court action was stayed pending a final resolution of the jurisdictional issue in Tribal Court. App. 15.

The Tribal Trial Court found that it had jurisdiction and ordered FMC to terminate certain non-Indian employees and pay fines. App. 15-16, 28. The Tribal Appellate Court reversed that decision, but upheld the authority of the Tribes to enforce TERO against FMC. App. 15-16. Before FMC could obtain a ruling in District Court on the jurisdictional issue, the Tribal Appellate Court, without input from FMC, imposed a compliance plan that supersedes, in certain respects, the TERO. App. 16. The compliance plan required 75% of all new hires and 100% of all promotions to be awarded to qualified Indians, mandated that one-third of all internal training opportunities be awarded to local Indians and levied an

annual TERO fee of approximately $100,000 on FMC. App. 4, 49. In upholding tribal jurisdiction, the Tribal Appellate Court concluded that the cancelled 1981 employment agreement established the necessary consensual relationship to support tribal regulatory authority to enforce the TERO under this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). App. 36. The United States District Court for the District of Idaho reversed. The District Court concluded that the employment agreement, once cancelled by the Tribes, could no longer support regulatory jurisdiction based on the consensual relationship exception expressed in *Montana*. App. 22. The District Court also concluded that FMC's commercial dealings with the Tribes in the form of mining leases and mining agreements could not support extension of tribal regulatory authority to the manufacturing plant's employment practices which were not closely tied to the mining activity occurring under the leases. App. 21-22. The District Court accordingly enjoined enforcement of the TERO. App. 23-25.

The Ninth Circuit Court of Appeals stayed the District Court's injunction pending appeal thereby requiring FMC to comply with the Tribal Appellate Court's compliance plan. The Ninth Circuit then reversed the District Court and, in doing so, held that the totality of the Tribes' dealings with FMC, including the cancelled employment agreement, the mineral leases, and FMC's employment of Indians at its facility constituted a consensual relationship sufficient to support jurisdiction under *Montana*. It also held that a federal district court must accept, unless clearly erroneous, the findings of fact made by a tribal court. App. 5. FMC's timely petition for review with suggestion for review *en banc* was denied. App. 54-55.

REASONS FOR GRANTING THE WRIT

"This Court, since its earliest days, has had the task of identifying those inherent sovereign powers [of Indian tribes] that survived the creation of a new Nation and the introduction of an entirely new system of laws applicable to both Indians and non-Indians." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159-60 (1982) (Stevens, J., dissenting). The Court's most recent treatment of this issue, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 109 S.Ct. 2994 (1989), did not produce an Opinion of the Court. The plurality opinion of Justice White, however, emphasized continued adherence to the general principle announced in *Montana v. United States*, 450 U.S. 544 (1981), that an Indian tribe has no authority to regulate the activity of non-Indians that occur on fee lands within an Indian reservation.

The plurality opinion also construed the two exceptions to this general principle recognized by *Montana*. It held that mere ownership of land within a reservation's boundaries did not constitute a "consensual relationship" with a tribe that would authorize tribal regulation under the *Montana* exception allowing regulation in some cases of "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[1] *Brendale*, 109 S.Ct. at 3007 (quoting *Montana v. United States*, 450 U.S. at 565).

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[1] *Montana* states that a tribe "may" regulate such consensual relationships. 415 U.S. at 565. In *Brendale*, the plurality

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It also rejected as "overbroad" the Ninth Circuit's interpretation of the second *Montana* exception, which in certain cases allows regulation of non-Indian activity on fee lands that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* The plurality opinion specifically rejected the Ninth Circuit's view that this exception authorized tribal jurisdiction that was co-extensive with a local government's police power. *Brendale,* 109 S.Ct. at 3007.

In contrast to *Brendale,* this case involves an overbroad interpretation by the Ninth Circuit of the first *Montana* exception dealing with consensual relationships. Specifically, the Ninth Circuit expressly rejected any requirement that tribal regulation based on a consensual relationship must bear some nexus to the consensual relationship in question. Instead, the Court held that once non-Indians enter into any consensual relationship with a tribe or its members, all of their activities within the reservation become subject to tribal regulation. This interpretation is contrary to the decisions of this Court and other lower courts. It also erects a substantial obstacle to the economic development of Indian reservations within the Ninth Circuit. Henceforth, non-Indian landowners within a reservation must carefully eschew any commercial dealings whatsoever with either a tribe or its

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opinion noted that the use of the word "may" with respect to the second *Montana* exception "indicates to us that a tribe's authority need not extend to all conduct" that is covered by the second exception, "but instead depends on the circumstances." *Brendale,* 109 S.Ct. at 3007.

members to avoid becoming subject to across-the-board regulation by a political system which excludes participation by non-Indians.

The assertion of jurisdiction by the Tribe in this case is also troubling because the TERO mandates an absolute preference in employment, contracting, and subcontracting in favor of Indians at the expense of non-Indians. Any attempt by a state or local government to impose such a preference would constitute a patent violation of the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Richmond v. Croson Co.*, 109 S.Ct. 706 (1989). Indian tribes are not subject to the Equal Protection Clause. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978). However, this Court has closely scrutinized the exercise of tribal authority when it is used to impose discriminatory burdens on non-Indians who lack any voice in tribal government. *See, e.g., Montana v. United States, supra*, (striking down tribal ordinance prohibiting hunting and fishing by non-Indians); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 109 S.Ct. at 3014 (Stevens, J. concurring) (upholding zoning regulation of "closed" portions of a reservation because, *inter alia*, regulation was non-discriminatory). The Ninth Circuit completely ignored the discriminatory nature of the TERO in upholding its validity.

Finally, the decision below is in clear conflict with the decisions of this Court that prohibit the delegation of judicial power to decide issues of federal law to courts that are not constituted in accordance with Article III of the United States Constitution. Specifically, the Ninth Circuit held that findings of fact on the issues of tribal

jurisdiction by a tribal court must be accepted by a federal district court as long as they are not clearly erroneous.[2]

The issue of tribal jurisdiction is a question of federal law. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). Fact finding on such an issue may not be delegated to tribal courts that do not comply with the requirements of Article III. The Ninth Circuit's standard of review, in this case of first impression, delegates significant judicial power to tribal courts in a radical departure from this Court's prior pronouncements protecting federal judicial power from delegation to administrative agencies, bankruptcy judges and federal magistrates.

I.

The Ninth Circuit's Decision Significantly Conflicts With Decisions of This Court That Limit The Authority of Indian Tribes Over Non-Indians

In concluding that FMC's consensual relationships with the Tribes supported imposition of the TERO, the Ninth Circuit made reference to three such relationships. First, it cited the employment agreement that FMC had made with the Tribes, which the Tribes had subsequently cancelled. Surely, however, a tribe cannot entice a non-Indian employer to enter into an employment agreement with reasonable affirmative action goals, turn around and

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[2] The Court below incorrectly attributed this standard of review to FMC. FMC repeatedly argued in favor of a *de novo* review of tribal court fact finding by the federal court, including the freedom to develop its own record if necessary.

unilaterally cancel the agreement, and then claim that this terminated consensual relationship authorizes the Tribe to impose extraordinarily onerous quota requirements on the unsuspecting employer. *Compare Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (tribal taxing authority may be permanently extinguished by clear waiver in mineral lease).

The Ninth Circuit also noted that FMC had employed members of the Tribe at its facility prior to enactment of TERO. This relationship is not accurately described as "consensual", since as an employer subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.* (West 1981 & West Supp. 1990), and a federal contractor subject to Exec. Order No. 11,246, FMC was at all times legally obligated to hire qualified Indians on a non-discriminatory basis. At least with respect to employment, FMC simply did not have the option of declining to hire Indians to avoid tribal jurisdiction.[3] Mere compliance by FMC with federal civil rights laws cannot be the basis for tribal jurisdiction.

Finally, the Ninth Circuit placed principal reliance on FMC's mineral leases with the Tribes and their members. There is, however, no significant nexus between the mineral leases, which govern mining operations located several miles from the manufacturing facility, and employment practices at the facility. In the absence of such a nexus, the District Court held that the Tribes could

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[3] Ironically, an employer that had never hired a single Indian would lack this particular basis for being subjected to the TERO. Employers with the worst Indian employment records are thus most likely to escape TERO jurisdiction.

not impose TERO quotas at FMC's manufacturing facility. The Ninth Circuit reversed, expressly rejecting any nexus requirement under *Montana's* consensual relationship exception.

The Ninth Circuit's decision is plainly inconsistent with *Montana*. Each of the cases cited in *Montana* as examples of consensual relationships justifying tribal jurisdiction over non-Indians involved tribal regulation of the very relationship the non-Indian had voluntarily entered into with the Tribe.[4]

A nexus limitation makes sense. One reason this Court has been careful to limit tribal jurisdiction over non-Indians is that such individuals "have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 110 S.Ct. 2053, 2064 (1990). Non-Indians who voluntarily enter into commercial relationships with an Indian tribe can legitimately expect that such relationships may be subject to tribal regulation. The same cannot

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[4] *See Williams v. Lee*, 358 U.S. 217 (1959) (non-Indian reservation merchant must use tribal court remedies to collect debt owed by reservation Indian as a result of voluntary transaction on reservation); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tribe could impose privilege tax on non-Indians grazing cattle on tribal lands); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (tribe may impose permit tax on merchant who trades with tribe); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (tribe may tax non-Indian's purchase of cigarettes on the reservation).

be said for other activities of the non-Indian on fee land that have nothing to do with the tribe.[5]

The broad interpretation given the consensual relationship exception by the Ninth Circuit also is likely to substantially impair the economic development of Indian reservations. Henceforth, any non-Indian landowner in the Ninth Circuit who enters into commercial dealings with a tribe or its members becomes subject to general tribal jurisdiction with respect to all of its activities on fee land within the reservation. Given the potential burdens that may be imposed by tribal regulation – and the absence of any opportunity to influence such regulation through the political process, this is indeed a steep price to pay for any commercial transaction with the tribe.

For example, the landowner in *Brendale* who seeks to build a development in the open area of the Yakima Reservation will almost certainly refrain from purchasing lumber and other construction materials from the Tribe, since such a purchase would subject him to the Tribe's zoning regulations under the Ninth Circuit's decision in this case.[6] Other non-Indian landowners can be expected

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[5] The Ninth Circuit's rejection of a nexus requirement also squarely conflicts with a district court decision in the Tenth Circuit, *UNC Resources, Inc. v. Benally*, 514 F.Supp. 358, 362-63 (D.N.M. 1981) (tribal court could not assert jurisdiction over tort action for damage to Indian land based on unrelated mineral leases and on-reservation mining operations of alleged tortfeasor).

[6] The plurality opinion in *Brendale* specifically rejected an interpretation of tribal authority that would result in a shifting of jurisdiction between tribal and local governments:

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to conclude that an economic embargo on all dealings with the Tribe is the only safe way to avoid general tribal jurisdiction. At a time when the Tribes complain that poverty and lack of economic development are a fact of life in Indian country, the Ninth Circuit's decision should not be allowed to erect such a substantial additional obstacle to commercial and economic development.

The Ninth Circuit's decision also conflicts with applicable decisions of this Court by failing to give any weight to the extraordinarily discriminatory nature of the TERO in its jurisdictional determination. The TERO imposes mandatory 100% Indian preferences in all aspects of employment and contracting that would be plainly unlawful if adopted by any other governmental entity. For example, in *Richmond v. Croson Co.*, 109 S.Ct. 706 (1989), this Court invalidated a 30% minority business set aside because it was not a narrowly tailored means of serving a compelling governmental interest as required by strict scrutiny under the Equal Protection Clause. In deciding that strict scrutiny was appropriate, this Court

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> Conceivably, in a case like this, zoning authority could vest variously in the county and tribe, switching back and forth between the two, depending on what uses the county permitted on the fee land at issue. Uncertainty of this kind would not further the interest of either the tribe or the county government and would be chaotic for landowners.

Brendale, 109 S.Ct. at 3008. The Ninth Circuit's decision, however, mandates just this sort of shifting authority depending on the current state of commercial dealings between the non-Indian landowner and the Tribe.

noted that minorities held a majority of seats on the City Council and commented:

> The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny of this case.

109 S.Ct. at 722 (Opinion of O'Connor, J.); *see also* 109 S.Ct. at 737 (Opinion of Scalia, J.).

Here, by contrast, the Ninth Circuit has approved an ordinance enacted by a tribal council that is composed exclusively of Indians which requires a 100% Indian set-aside for employment and contracting. Obviously, such a measure would be plainly unconstitutional if Indian tribes were subject to the Equal Protection Clause.[7] They are not. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 56. The Tribes are subject to the Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1301-1303 (West 1983 & West Supp. 1990), which prohibits an Indian tribe from denying "to any person within its jurisdiction the equal protection of its laws. . . . " 25 U.S.C.A. § 1302(8) (West 1983). The Act, however, is only enforceable in tribal court, the very

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[7] In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court rejected a challenge to a Congressionally mandated Indian preference for positions within the Bureau of Indian Affairs, holding that the preference did not constitute racial discrimination, but rather was "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. While this rationale may support the use of preferences for BIA positions that deal with Indian self-government, it has no applicability to positions at FMC.

entity that promulgated the discriminatory compliance plan at issue here.[8]

Thus, the TERO imposes on FMC and its non-Indian employees a substantial discriminatory burden through a political process that excludes them from participation.[9] This Court has considered such discrimination against non-Indians an important factor in assessing the lawfulness of tribal jurisdiction. Most recently, in upholding the Yakima Tribes' authority to zone real property located in the closed area of their reservation, Justice Stevens distinguished the Indian-only hunting ordinance that had been struck down in *Montana* by noting:

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[8] The TERO was also approved by the Secretary of the Interior, but FMC had no notice or opportunity to participate in this process. Such a procedure offers scant protection to FMC and its non-Indian employees. *See Merrion v. Jicarilla Apache Tribes*, 455 U.S. at 190 (Stevens, J., dissenting) ("If the Court is willing to ignore the risk of such unfair treatment of a local contractor or a local doctor because the Secretary of the Interior has the power to veto a tribal tax, it must equate the unbridled discretion of a political appointee with the the protection afforded by rules of law. That equation is unacceptable to me.").

[9] Non-Indian employees of FMC who lose their jobs or find themselves forever barred from obtaining a promotion as a result of TERO would have no remedy under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq.* (West 1981 & West Supp. 1990). Title VII does not apply to "any publicly announced employment practice . . . under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42 U.S.C.A. § 2000e-2(i) (West 1981). This provision on its face authorizes employers to adopt voluntary affirmative action measures, without requiring such programs. TERO goes much further by mandating 100% Indian preferences.

> [T]he *Montana* case involved a discriminatory land use regulation. [citation omitted.] The Tribe's regulation prohibited non-Indians from hunting or fishing on their own property while members of the Tribe were free to engage in those activities. In contrast, petitioners do not suggest that a member of the Tribe would be allowed to undertake the development Brendale proposes. It is Brendale who seeks a special, privileged status.

Brendale, 109 S.Ct. at 3014 (Stevens, J., concurring).

The Ninth Circuit's decision completely ignores the discriminatory nature of the TERO. Instead, if non-Indians have entered into any significant consensual relationship with the tribe, they are subject to the full panoply of tribal regulation no matter how discriminatory. This squarely conflicts with the approach taken by this Court.

In short, given the absence of an opinion of the Court in *Brendale*, lower courts are faced with substantial uncertainty in evaluating the lawful reach of tribal jurisdiction. In this state of uncertainty, the Ninth Circuit has expansively interpreted the consensual relationship exception in *Montana* so that it threatens to swallow the general rule and at the same time impede the development of commercial relations between Indians and non-Indians. Certiorari should be granted to address this important issue.

II.

The Ninth Circuit's Decision Deprives Non-Indian Litigants Challenging Tribal Jurisdiction of an Article III Adjudication of Important Questions of Federal Law.

This Court has long held that delegation of federal judicial fact finding authority to a non-Article III officer is

not permissible. *Crowell v. Benson*, 285 U.S. 22 (1932) (Longshoremen's and Harbor Workers' Act construed to permit *de novo* hearing by federal court to avoid challenge under Article III); *United States v. Raddatz*, 447 U.S. 667 (1980) (1978 Federal Magistrate Act did not violate Article III because both magistrate's findings of fact and legal conclusions were subject to *de novo* review by federal district court); *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Bankruptcy Act of 1978 violated Article III by delegating judicial authority over private-rights disputes to non-Article III judges which was not cured by providing for appellate review to an Article III Court).

The lawfulness of tribal jurisdiction over non-Indians is a question of federal law. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). Under this Court's decisions, however, any challenge to tribal jurisdiction must first be made in tribal court. *Id.* That, in and of itself, seems reasonable only because ultimately the exercise of jurisdiction can later be challenged in federal court. The Ninth Circuit's decision, however, significantly erodes the non-Indian's right to challenge tribal jurisdiction over its activities.

The Ninth Circuit concluded that the United States District Court must accept, unless clearly erroneous, the findings of fact adopted by the Tribal Court in determining the nature and extent of tribal jurisdiction. Limiting the federal trial court's role in constructing a record and finding facts substantially impairs important rights guaranteed to all citizens by the Constitution. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 416 (1964) ("Limiting the litigant to review here [in the

Supreme Court] would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims."). These guarantees should especially be protected in cases involving a challenge by a non-Indian to the regulatory authority asserted over it by an Indian tribe because the federal court is the non-Indian's only recourse to an independent tribunal.

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) invalidated the Bankruptcy Act's broad delegation of judicial authority to non-Article III bankruptcy judges because the bankruptcy court's judgment was reviewable only under a "clearly erroneous" standard. In doing so this Court stated "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art III". *Id.* at 59.

In *Crowell v. Benson*, 285 U.S. 22 (1932) this Court rejected " . . . the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. . . . " *Id.* at 60-61.

Although Article III challenges most often arise when Congress attempts, through legislation, to delegate judicial power to a non-Article III body, the right of a litigant to an Article III adjudication must be protected, even when the federal judiciary itself attempts to deny that right. A non-Indian's challenge to tribal jurisdiction ultimately depends on interpretation of federal law. Whether the ultimate decision is for or against the non-Indian, the

validity and respect for that decision can only be maintained if there exists an opportunity for independent review by the federal judiciary.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Dated: January 17, 1991

Opinion of the United States Court of Appeals
for the Ninth Circuit

FMC, Plaintiff-Appellee,

V.

SHOSHONE-BANNOCK TRIBES, et al., acting By and Through its Tero Commission aka The Shoshone-Bannock Tribes Tribal Employment Rights Commission and its individual Commissioners, Arnold Appenay, Al Timsanico, Marvin Osborne and R. Willis Dixey; Shoshone Bannock Tribal Court; Honorable Charles H. Lonah; Honorable Robert Gonzales, Defendant-Appellants.

No. 89-35349.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 9, 1990.

Decided June 18, 1990.

Jeanette Wolfley, General Counsel, Shoshone-Bannock Tribes, Fort Hall, Idaho, for defendants-appellants.

Gary L. Cooper, Racine, Olson, Nye, Cooper & Budge, Pocatello, Idaho, for plaintiff-appellee.

Melody L. McCoy, Boulder, Colo., for amicus, Native American Rights Fund.

Appeal from the United States District Court for the District of Idaho.

Before FARRIS, PREGERSON and BOOCHEVER, Circuit Judges.

FARRIS, Circuit Judge:

This case presents the question of the extent of power Indian tribes have over non-Indians acting on fee land located within the confines of a reservation. The Shoshone-Bannock Tribes are attempting to enforce a Tribal Employment Rights Ordinance, which requires all employers working on the reservation to give mandatory preferences in hiring to Indians. FMC, a non-Indian business operating on fee land inside the Reservation, challenges the Tribes' power to enforce the ordinance. The district court held that the Tribes did not have jurisdiction over FMC, reversing the decision of the Tribal Appellate Court, which had upheld the Tribes' jurisdiction to enforce the regulation. We reverse the decision of the district court and affirm the decision of the Tribal Appellate Court.

I.

BACKGROUND

The Shoshone-Bannock Tribes are federally recognized tribes residing on the Fort Hall Reservation in southeastern Idaho. The reservation encompasses 870 square miles, of which 96 per cent is tribal land or is held in trust by the United States for the benefit of the Tribes or their members, and four per cent is fee land owned by individuals, including non-Indians. As on many reservations, unemployment is rampant among the Shoshone-Bannock and contributes to the concomitant problems of poverty, alcoholism, drug abuse, and economic dependency.

In order to combat the problem of unemployment, in 1980 the Tribal Business Council, the governing body of the Tribes, adopted a Tribal Employment Rights Ordinance, EMPT-80-54, July 22, 1980. The TERO required employers working on the Reservation to give preference in employment, contracting, and subcontracting to Indians. The Secretary of the Interior approved the Ordinance on October 14, 1980. The TERO applies to all employers within the Reservation, including those owned by non-Indians operating on fee land.

FMC is such an employer. This non-Indian owned company has a plant on fee land within the Reservation that manufactures elemental phosphorus. FMC is the largest employer on the Reservation, with 600 employees. FMC has other connections to the Reservation in addition to the location of its plant. The company currently gets *all* of the phosphate shale (one of the three primary raw materials required for production) from mining leases located within the Reservation. The phosphate shale constitutes approximately 90 percent of the minerals used at the facility. The shale leases are on lands owned by the Tribes or by individual Indians. FMC's leases are managed and operated by J.R. Simplot Company, whose operation of the mines is regulated by the TERO. The mining leases account for revenue to the Tribes and to individual members. All other materials used in production come from areas off-Reservation. The final product, elemental phosphate, is all shipped off-Reservation.

Upon notification of the passage of the TERO, FMC objected to the ordinance's application to its plant. After negotiations with the Tribes, FMC entered into an employment agreement based on the TERO in 1981 that

resulted in a large increase in the number of Indian employees at FMC.

In late 1986, the Tribes became dissatisfied with FMC's compliance with the employment agreement. After attempts to negotiate an end to the alleged violations of the agreement failed, the Tribes filed civil charges in Tribal Court. FMC immediately challenged the Tribal Court's jurisdiction in federal district court and persuaded the district court to enjoin the Tribes from enforcing any orders against FMC until the Tribal Court had an opportunity to rule on the Tribes' jurisdiction over FMC. The Tribal Court then found that the Tribes had jurisdiction over FMC and held that the company had violated the TERO. The Tribal Appellate Court affirmed those rulings. When the parties could not reach agreement for compliance, the Tribal Appellate Court entered its own compliance plan, which required 75% of all new hires and 100% of all promotions to be awarded to qualified Indians, mandated that one-third of all internal training opportunities be awarded to local Indians, and levied an annual TERO fee of approximately $100,000 on FMC. FMC then returned to federal district court for a preliminary injunction, which it received. In April 1988, the district court reversed the Tribal Appellate Court. The Tribes now appeal.

II.

STANDARD OF REVIEW

We review the decision of the district court, involving mixed questions of fact and law, *de novo*. *United States v.*

McConney, 728 F.2d 1195, 1204 (9th Cir.), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

The standard of review of a tribal court decision regarding tribal jurisdiction is a question of first impression among the circuits. The district court applied an "independent review" standard. The Tribes and amicus argue for a more deferential standard of clearly erroneous or arbitrary and capricious on both factual and legal questions, while FMC argues for clearly erroneous on factual questions and *de novo* on federal legal questions. We hold that FMC's proposed standard of review is the correct one.

The leading case on the question of tribal court jurisdiction is *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), which established that a federal court must initially "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." This exhaustion of tribal remedies

> allow[s] a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . [It also will] encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Farmers Union, 471 U.S. at 856-57, 105 S.Ct. at 2454 (citations and footnotes omitted). The existence of this Indian exhaustion requirement and the Court's earlier admonition that tribal courts are competent law-applying bodies,

see, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66, 98 S.Ct. 1670, 1680-81, 56 L.Ed.2d 106 (1978), demonstrate that federal courts must show some deference to a tribal court's determination of its own jurisdiction.

The *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." *Id.* This indicates a deferential, clearly erroneous standard of review for factual questions. This standard accords with traditional judicial policy of respecting the factfinding ability of the court of first instance. *See generally McConney*, 728 F.2d at 1200-04 (noting that the central goal in setting standards of review is to favor the court in the stronger position to determine the correct answer efficiently).

As to legal questions, the *Farmers Union* Court stated that the fact that a tribal court reviews a question first is helpful because other courts might "benefit [from] their expertise." *Farmers Union*, 471 U.S. at 857, 105 S.Ct. at 2454. This indicates that federal courts have no obligation to follow that expertise, but need only be guided by it. Moreover, federal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question. *Id.* at 852-53, 105 S.Ct. at 2451-52. Federal legal questions should therefore be reviewed *de novo*.

III.

TRIBAL JURISDICTION

The Tribal Appellate Court held that the Tribes had jurisdiction to enforce the TERO against FMC. The court

based its decision on *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the leading case on tribal civil jurisdiction over non-Indians. The *Montana* court stated:

> [There are two circumstances in which] Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66, 101 S.Ct. at 1258 (citations omitted). The Tribal Appellate Court found that both *Montana* circumstances were present here. The court held that there was a consensual relationship between the Tribes and FMC sufficient to support application of the TERO to FMC, and also that the Tribes' economic security and general welfare would suffer by not enforcing the TERO against FMC. We reach only the first *Montana* factor, as we hold that the Tribal Appellate Court's decision on this ground was correct, and therefore the district court erred in its reversal.

Montana's First Test: Consensual Relationships.

In order to allow tribal jurisdiction over non-Indians on fee land, *Montana* requires "consensual relationships

with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565, 101 S.Ct. at 1258. FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly on fee and not on tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money involved.

The district court held and FMC argues on appeal that these connections between the company and the Tribes, although substantial, do not provide a sufficiently close "nexus" to employment to support the TERO. FMC cites *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982), to support its argument that a direct linkage must exist between the regulation and the particular activity regulated. In *Cardin*, a non-Indian owner of a grocery store on fee land inside the reservation sought to enjoin the tribe from enforcing its health regulations against him. We held that the non-Indian had entered into "consensual relations" with the tribe "through commercial dealing": The owner invited tribe members to come into the store for his products and depended on them to support his

business. *Cardin* contains no explicit requirement of a nexus.

The commercial relationships here are at least as substantial as in *Cardin*. FMC depends on leases with the Tribes or tribal members for a substantial percentage of its raw materials at this plant, it has signed numerous contracts with the Tribes, including one relating particularly to employment, and finally, the company employed some, though few, Indians at the plant even before the TERO applied. FMC actively engaged in commerce with the Tribes and so has subjected itself to the civil jurisdiction of the Tribes. *See e.g., Babbitt Fort, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (car dealer subjected himself to tribal jurisdiction by conducting business with the tribe), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984).

FMC is of course correct that at some point the commercial relationship becomes so attenuated or stale that *Montana's* consensual relationship requirement would not be met. For example, in *UNC Resources, Inc. v. Benally*, 514 F.Supp. 358, 362 (D.N.M. 1981), cited by FMC, none of the Tribe's dealings with the company related directly to the plant in question, which was not even inside the reservation. *See also United States v. Anderson*, 736 F.2d 1358, 1364-65 (9th Cir. 1984) (finding no consensual relationship). The relationship here, however, is close enough to support the regulation.

CONCLUSION

We reverse the decision of the district court. The Tribes may subject FMC to regulation of employment at

its plant on fee land within the Reservation. We remand to the Tribal Court to give FMC an opportunity to challenge the application of the TERO under the Indian Civil Rights Act, 25 U.S.C. § 1302.

Memorandum Decision and Order of the United States District Court for the District of Idaho

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FMC, a Delaware corporation, Plaintiff, -vs- SHOSHONE-BANNOCK TRIBES, acting by and through its TERO COMMISSION, aka THE SHOSHONE-BANNOCK TRIBES TRIBAL RIGHTS COMMISSION and its individual commissioners, ARNOLD APPENAY, AL TIMSANICO, MARVIN DIXEY, AND THE SHOSHONE-BANNOCK TRIBAL COURT, its employees, officials and judges, specifically the HONORABLE CHARLES H. LOHAH and the HONORABLE ROBERT GONZALES, Defendants.	Civil No. 87-4059 MEMORANDUM DECISION

This Court has before it an appeal from a decision of the Shoshone-Bannock Tribal Appellate Court asserting jurisdiction over plaintiff FMC, a non-Indian corporation doing business on fee lands within the Reservation. FMC challenges sanctions imposed on it by the Tribal Appellate Court for violating a Tribal ordinance requiring that preference be given to Indians in employment and contracting. This Court heard oral argument on the appeal

and received additional briefing which was completed March 24, 1989. The appeal is now ready to be resolved.

Well-established standards guide this Court's review of the Tribal Court's decision. While the Tribal Court's interpretation of Tribal law is binding, this Court must make an independent determination whether the "Tribal Court has asserted its jurisdiction beyond lawful limits." *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988). Before embarking on that task, the Court will review the pertinent facts.

FMC is a Delaware corporation operating a phosphate processing facility within the Reservation boundaries[1] on property it owns in fee. To obtain its phosphates, FMC has entered into mineral leases covering Tribal or Indian lands. The actual mining of the phosphates is done by J.R. Simplot Company under the terms of a subcontract with FMC.

In 1980, the Tribe adopted a Tribal Employment Rights Ordinance (TERO), which was amended and expanded in 1988. *See* Exhibit 20 to FMC's Brief filed September 21, 1988. The basic purpose of the TERO is to "require the preferential employment of Indians and Indian-owned firms by all contract awarding entities and employers operating within the exterior boundaries of the Fort Hall Reservation." *Id.* at § 1.1. To implement this

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[1] While FMC does own land outside the Reservation boundaries, it is undisputed that its processing facilities are all located within the Reservation boundaries. This lawsuit concerns the activities within those facilities and it is not seriously contested that for purposes of this suit, FMC is operating within Reservation boundaries.

purpose, the TERO provides that an employer on the reservation may not employ a non-Indian until he has given the Shoshone-Bannock Employment Rights Office 72 hours to locate and refer a qualified local Indian. *Id.* at § 2.1(a). With regard to contracting, the employer is required to notify Indian-owned or Tribal-owned businesses of their right to bid on a contract. If these businesses intend to bid, then the employer "shall be limited to local or Shoshone-Bannock Tribal members' certified firms." *Id.* at § 3.3(a). If the bid price is not "reasonable," the employer must attempt to negotiate a lower price before it can reject that firm. *Id.* at § 3.5(b).

The original TERO was adopted by the Tribe on July 22, 1980, and a copy was mailed to FMC on July 24, 1980. Thereafter, the parties began negotiations and on July 23, 1981, entered into an "Employment Agreement" which modified the TERO terms to make them less harsh on FMC. For example, the Employment Agreement only required FMC to "consider" Indians in hiring, and did not require that "preference" be given. *Id.* at Exhibit 6, § 2. The Employment Agreement contracting provisions were also less stringent than the TERO. *Id.* at § 1. There is a dispute over the characterization of this Employment Agreement: FMC states that "it was recognized by both parties [FMC and the Tribe] that the Agreement superseded and took the place of the TERO ordinance. . . . " *See* FMC's Brief filed September 21, 1988, at p.6. The Tribe argues that the Agreement was a compliance plan contemplated by the TERO and implementing the TERO's general directives. *See* Brief of the Tribe filed November 1, 1988, at p.10. The Tribal Appellate Court found that the Employment Agreement "is a compliance plan and not an

Agreement which supersedes the TERO." *Id.* at Exhibit 18, p.11. It is unclear whether the Court is bound by this finding of the Tribal Appellate Court. Nevertheless, the Court will assume for the purposes of this opinion that the Employment Agreement was a compliance plan.

In May 1986, the Tribe notified FMC of its dissatisfaction with FMC's compliance with the 1981 Employment Agreement. When no changes were forthcoming, the Tribe decided to cancel the Employment Agreement. By letter dated January 7, 1987, the Tribe pointed out that over half its members were unemployed and that the present Agreement was not serving the Tribe's interest. The letter went on to state:

> Therefore the Shoshone-Bannock Tribes hereby notifies FMC Corporation, Phosphorus Chemical Division – Pocatello Plant, that the Employment Agreement dated August 1, 1981, is cancelled.

The parties continued negotiating through the winter of 1987 with little progress. FMC was embarking on a significant electrical project known as Phase II of the Calciner Project. Bids for this work were submitted by four firms, including one Indian-owned firm, Warbonnet Electric. When FMC did not make the bid award to Warbonnet, the Tribe filed a complaint against FMC in the Tribal Court alleging that FMC had violated TERO and failed to give preference to Indian-owned firms in contracting. The Tribe sought to enjoin FMC from proceeding with the Calciner Phase II Project, and FMC challenged the jurisdiction of the Tribal Court. The Tribal Court entered a verbal temporary restraining order on April 10,

1987, and later followed that up with a preliminary injunction.

The Tribe also filed a second complaint against FMC in the Tribal Court alleging that FMC's hiring practices violated the TERO by failing to give preference to Indians. The complaint prayed for, among other things, an order temporarily enjoining FMC from filling any vacancies until the Tribe had the opportunity to locate and refer qualified Indian workers. At a Tribal Court hearing, FMC again contested the jurisdiction of the Tribal Court but was again unsuccessful.

By May 1, 1987, FMC had two restraining orders pending against it, one involving hiring preference and the other involving contracting preference. In response to those injunctions, FMC filed a complaint in this Court seeking its own injunction, negating the effects of the two Tribal Court injunctions. In an order filed May 19, 1987, this Court issued a preliminary injunction enjoining the effect of the two Tribal Court injunctions.

In a subsequent order filed October 30, 1987, the Court directed the parties to seek a final ruling from the Tribal Court as to whether the Tribe had jurisdiction over FMC. This exhaustion requirement had been established by Supreme Court precedent. *See Iowa Mutual Ins. Co. v. La Plant*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

The parties have now exhausted their Tribal Court remedies. On May 19, 1988, the Tribal Appellate Court held that FMC was subject to the TERO, but reversed a decision of the lower Tribal Court requiring FMC to fire certain employees and pay fines. Instead, the Tribal

Appellate Court ordered the parties to negotiate another compliance plan within sixth days or the Court would impose a plan upon the parties. The parties were unable to negotiate a settlement, and thus the Tribal Court imposed a compliance order. *See* Exhibit 2 attached to Tribe's Brief filed November 10, 1988. That compliance order provides that FMC shall give preference to Indians,

> for 75% of the initial hires and for 75% of the vacancies, regardless of level, where positions are not covered by or cannot be filled pursuant to, the terms of FMC's collective bargaining agreement.

Id. at p.2.

In addition, the compliance order requires the establishment of a training program and counseling for Indians in danger of being fired by FMC. *Id.* at pp. 3-5. If there were violations of the order, the Tribal Appellate Court retained jurisdiction to impose sanctions. *Id.* at p.5.

FMC has appealed the decision of the Tribal Appellate Court. The precise issue before this Court is whether the Tribe has the power to regulate employment practices of non-Indians operating on fee lands within the Reservation. This Court clearly has the power to determine whether the Tribe properly exercised jurisdiction over FMC. 28 U.S.C. § 1331; *National Farmers Union Co. v. Crow Tribe, supra.* Although no court has specifically addressed the jurisdictional issue faced here, the courts and commentators have at least established some guidelines for considering issues of this kind.

The Tribe's authority over non-Indians derives either from inherent tribal sovereignty or from delegated

authority. F. COHEN, *Handbook of Federal Indian Law*, 253 (1982 ed.). The parties have not pointed the Court to any delegated authority in this case, and thus the Court must determine whether the Tribe's inherent sovereignty allows it to impose ordinances such as TERO upon FMC. The seminal Supreme Court case on the inherent sovereign power of the Tribe over non-Indians is *Montana v. United States*, 450 U.S. 544 (1981). In that case, the Court found that the Tribe did not have jurisdiction over fishing by non-Indians on non-Indian land within reservation boundaries. The Court reasoned that the Indian tribes have lost many of the attributes of sovereignty since their incorporation into the United States. *Id.* at 563. As a consequence of that loss of sovereignty, the tribes could exercise jurisdiction over non-Indians on fee lands in only two circumstances. First, a tribe may "regulate through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements." *Id.* at 510. The Court found no evidence of any such consensual relationship in that case. Secondly, the tribe also has inherent power over the conduct of non-Indians on fee lands within the reservation when "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566. On this point, the Court held that there was no allegation that "non-Indian hunting and fishing on fee lands imperil[s] the subsistence or welfare of the tribe." *Id.* at 566.

Montana establishes a general rule that the Tribe has no jurisdiction over a non-Indian entity operating on fee

lands unless the non-Indian has entered into consensual relations with the Tribe or is engaging in conduct imperilling the subsistence or welfare of the Tribe. The Ninth Circuit has had occasion to apply *Montana* to a number of different fact situations. For example, the Circuit has held that the Tribe may enforce its safety regulations against a non-Indian operating a store on fee lands within the reservation when the store was a fire hazard and had a rodent problem. *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982). The store did commercial business with Tribe members and thus subjected itself to tribal jurisdiction under the consensual prong of *Montana*. *Id.* at 366. In addition, the Ninth Circuit found that the Tribe's safety regulations prevented conduct threatening to the Tribe and thus fell within the health and welfare prong of *Montana*.

As another example, the Circuit held that the Tribe has jurisdiction to enforce zoning regulations against non-Indians on fee lands within the Reservation. *Tribes & Bands of Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987). The Circuit reasoned that zoning protects the entire Tribe from "the damage caused by uncontrolled development" and furthers the "unique relationship of Indians to their lands." *Id.* at 534.

As a third example, the Circuit held that when a non-Indian marries an Indian and resides on the Reservation, the Tribal Court has jurisdiction as part of a divorce decree to award child support against the non-Indian. *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988). The marriage is the type of consensual relationship under *Montana* by which the non-Indian subjects himself to the Tribe's jurisdiction. *Id.* at 632.

When examining these cases it is important to remember that the "Indian tribes have lost many attributes of sovereignty," *Montana v. United States, supra* at 563, because "the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *United States v. Wheeler*, 435 U.S. 313, 326 (1978). This loss of sovereignty has led the Supreme Court to conclude that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." *Montana v. United States, supra* at 563. The whole tenor of these decisions is that the Tribe's jurisdiction over non-Indians operating on fee lands is circumscribed and narrowly bounded. The cases have permitted jurisdiction only where the Tribe's health and welfare is imperilled or where the non-Indian has subjected himself to jurisdiction by consent.

With these principles in mind, the Court turns to the facts of the present case. Here, the Tribe argues that FMC's conduct in not giving hiring preference to Indians imperils the Tribe's economy. The Tribe states that many Tribal members live in poverty and the "only way for its members to get out of poverty is by obtaining jobs; and FMC, as the largest Reservation employer, is key to those jobs." *See* Brief of Tribe filed November 1, 1988, at p.57. The Tribe then points out that if FMC would hire Indians for 50% of FMC's blue collar workforce, it would "reduce the Tribal unemployment rate from 20% to 7%." *Id.* at p.57.

While the Tribe may have accurately calculated the short-term effect of a rise in FMC hiring, the statistics

show that greater hiring may do little in itself to lower the unemployment rate: while FMC has hired 156 Indians since 182, *see* Graph 3 to Plaintiff's Reply Brief filed November 18, 1988, 99 of those Indians either quit or were terminated. *Id.* at Graph 5. The majority of Indians leaving FMC either quit or were terminated for absenteeism. *Id.* at Graph 5. While Indians make up 8.9% of the workforce, they account for 54% of the terminations since 1982. *Id.* at Exhibit A.

These statistics show that increased hiring by FMC will have very little effect on the Tribe's unemployment rate unless the pattern of quitting and absenteeism is broken. It is admirable that the Tribal Appellate Court and the TERO provide for the establishment of training programs to correct these dismal retention statistics. And certainly additional hiring of Indians by FMC would assist the Tribe. But when the real problem is worker retention, additional preferential hiring is at best a partial and marginal solution. It is the quitting and absenteeism that imperils that Tribe's economic security, not FMC's conduct.

The Tribe also complains of FMC's contracting practices and seeks preference for Indian-owned firms. According to the affidavit of F. Harvey Herbert, Phosphorus Chemicals Division Manager for FMC, the only Indian-owned contracting firm in the area was Warbonnet Electric. *See* Affidavit of Herbert filed May 5, 1987, at p.8. Between 1982 and 1987, FMC paid over $3.5 million to that firm for contracting work. *Id.* at p.8. Could Warbonnet have handled more work? Are other firms in existence? The record is silent on these facts. The record simply shows that additional preference for Indian-

owned firms, like hiring preference, would be marginally beneficial to the Tribe but the lack of preference does not imperil the subsistence or welfare of the Tribe. Under these circumstances, the Court cannot find that FMC's contracting practices threaten or imperil the Tribe's economic security under the *Montana* decision.

The Court turns next to the consensual relations prong of the *Montana* case. In those cases that have examined the issue whether a non-Indian's consensual relations with the Tribe subject him to Tribal civil jurisdiction, there has been a linkage between the consent given by the non-Indian and the Tribe's assertion of jurisdiction over that non-Indian. Thus, if you consent to marry an Indian, you subject yourself to Tribal Court jurisdiction for purposes of divorce and child custody, but no court has held that such consent subjects the non-Indian to Tribal Court jurisdiction for purposes other than dealing with that marriage relationship. By the same token, if the non-Indian runs a commercial business on the Reservation, he "consents" to Tribal jurisdiction for zoning and safety purposes, but has he also "consented" to the Tribe's general civil jurisdiction?

The linkage between consent and jurisdiction is vitally important because the Tribe's inherent power over non-Indians on fee land has been substantially lost. In the present case, the Tribe points to the numerous leases entered into between the Tribe and FMC to mine phosphate ore on Reservation land as evidence of a consensual relationship. As the Tribe accurately points out, "FMC is a major lessee of Tribal lands, has paid millions of dollars in royalties to the Tribe and its members under these leases, and is constantly dealing with the Tribe on

lease and royalty issues." *See* Brief of the Tribe filed November 1, 1988, at p.50. But the Tribe is not seeking jurisdiction over employment practices at the mines pursuant to these leases. At most, the leases would give the Tribe jurisdiction over the mining activity occurring thereunder, but it is too great a leap to say that the leases give the Tribe jurisdiction over FMC generally. As previously discussed, there should be a close nexus between the consent given and the jurisdiction exercised. No such nexus exists here. The mining is all done by entities other than FMC at a site far removed from FMC's fee lands. The employment practices over which the Tribe seeks jurisdiction occur on facilities which are not governed in any manner by the leases. Because there is no sufficient nexus between the leases and the processing facility, the Court finds that the leases do not provide grounds for the Tribe's exercise of jurisdiction over the processing facility.

The Tribe is also arguing that the 1981 Employment Agreement constitutes a consensual relationship between the Tribe and FMC. But that argument ignores the January 7, 1987, letter whereby the Tribe itself cancelled that Agreement. The Court therefore finds that the two exceptions set forth in *Montana* do not apply to this case, and that the Tribe cannot base an assertion of jurisdiction over FMC upon those two exceptions.

The next issue raised is whether the less stringent jurisdictional test employed in *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), is applicable. In *Colville*, the Court held that tribal sovereignty is divested only when its exercise is inconsistent with overriding federal interests. The Ninth Circuit has expressed some uncertainty as to whether the *Colville* test applies to

non-Indians operating on fee lands. In *Tribes and Bands of Yakima Indian Nation v. Whiteside, supra,* the Circuit held that the Tribe had jurisdiction to zone non-Indians on fee lands under the "more stringent" *Montana* test and thus did not "determine whether the *Colville* analysis is appropriate to determine tribal authority over non-Indians." *Id.* at 534. In Fact, *Colville* preceded *Montana,* and while *Montana* dealt directly and specifically with tribal jurisdiction over non-Indians on fee lands, the *Colville* decision "did not rule directly, however, on tribal jurisdiction over non-Indians in Indian country." F. COHEN, *Handbook of Federal Indian Law,* 256 at n.114 (1982 ed.). This area of the law is certainly confusing, but it does appear that *Montana* rather than *Colville* governs this case and the Court so holds.

Under all of these circumstances, the Court will therefore reverse the decision of the Tribal Appellate Court issued on May 19, 1988, and stay the effect of the compliance order issued October 10, 1988, and filed with the Tribal Court on October 11, 1988.

DATED this 14th day of April, 1989.

MARION J. CALLISTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FMC, a Delaware corporation, Plaintiff, -vs- SHOSHONE-BANNOCK TRIBES, acting by and through its TERO COMMISSION, aka THE SHOSHONE-BANNOCK TRIBES TRIBAL RIGHTS COMMISSION and its individual commissioners, ARNOLD APPENAY, AL TIMSANICO, MARVIN DIXEY, AND THE SHOSHONE-BANNOCK TRIBAL COURT, its employees, officials and judges, specifically the HONORABLE CHARLES H. LOHAH and the HONORABLE ROBERT GONZALES, Defendants.	Civil No. 87-4059 ORDER

The Court has examined the entire record concerning the appeal by the plaintiff from the decision of the Tribal Appellate Court issued May 19, 1988, and the compliance order issued October 10, 1988, and filed October 11, 1988, with the Shoshone-Bannock Tribal Court, as well as the plaintiff's motion for preliminary injunction staying the effect of the order and compliance plan filed October 11, 1988. In accordance with the views expressed in the memorandum decision accompanying this order,

NOW, THEREFORE, IT IS HEREBY ORDERED that the decision of the Tribal Appellate Court issued May 19, 1988, be, and the same is hereby, REVERSED, and this

Court hereby determines that the Shoshone-Bannock Tribes and the Shoshone-Bannock Tribal Court have no jurisdiction to impose the terms of the Tribal Employment Rights Ordinance upon plaintiff FMC and have no jurisdiction to impose sanctions under that ordinance against plaintiff FMC.

IT IS FURTHER ORDERED that the order and compliance plan issued by the Tribal Appellate Court on October 10, 1988, and filed with the Shoshone-Bannock Tribes on October 11, 1988, be, and the same is hereby, STAYED, by order of this Court.

DATED this 14th day of April, 1989

/s/
MARION J. CALLISTER
UNITED STATES
DISTRICT JUDGE

Memorandum Opinion and Order of the Shoshone-Bannock Tribal Court, Appellate Division

SHOSHONE-BANNOCK TRIBAL COURT
Fort Hall Indian Reservation Idaho

APPELLATE DIVISION

FMC Corporation, Appellant, vs. Shoshone-Bannock Tribes, Acting by and through its TERO Commission Appellee	)	Case No. INJ-87-31 C-87-64 MEMORANDUM OPINION AND ORDER

Meyers, J., Appellate Judge

On July 22, 1987, the trial court of the Shoshone-Bannock Tribal Court system decided the matter of Shoshone-Bannock Tribes v. FMC Corporation, No. C-87-39 (Sho-Ban. Tr. Ct., July 22, 1987) 14 ILR 6046, Judge Robert L. Hunter, Jr., presiding by special designation. FMC Corporation (FMC), the Appellant in this matter, seeks review of the trial court decision from this Court on several grounds: (1) that the tribal government has no civil jurisdiction or regulatory authority over Appellant's business situated on non-Indian fee land within the exterior boundaries of the Reservation; (2) that tribes are without governmental power to levy fines, impose civil penalties, require bonds, enter restraining orders or order removal of non-Indians from employment with a non-Indian firm doing business on fee land within the exterior boundaries of the Reservation; (3) that the lower court

decision is contrary to and not supported by the evidence; (4) that the trial court failed to join indispensable parties, and; (5) that this case amounts to selective enforcement of the Tribal Employment Rights Ordinance (TERO).

PROCEEDINGS BELOW

On April 15, 1987, the Tribal Employment Rights office of the Shoshone-Bannock Tribes, the Appellee, brought an action in tribal court alleging that Appellant had violated provisions of the TERO. The Appellee sought and was granted a temporary restraining order (TRO) restraining the Appellant from recalling or promoting non-Indians on Appellee's temporary recall list pending a ruling on Appellee's request for a preliminary injunction. On May 1, 1987, the tribal court heard oral arguments on the motion for preliminary injunction. It extended the temporary restraining order for 10 days and on May 11, 1987 issued the requested preliminary injunction.

On April 24, 1987, Appellant filed for a preliminary injunction in federal district court to enjoin the tribal court from enforcing its temporary restraining order or preliminary injunction. The federal district court issued an order on May 19, 1987, enjoining the tribal court until tribal jurisdiction over Appellant was addressed by this Court.

The Appellee amended its original complaint, adding a cause of action alleging that Appellant violated § 4.8 of the TERO by hiring 13 non-Indians in the past two years for temporary laborer positions without first giving the

TERO office an opportunity to locate and refer Indians for these positions. An expedited hearing was held before Judge Robert L. Hunter, Jr., on May 14, 1987. Judge Hunter rendered an opinion and order on July 22, 1987. It is from that decision that this appeal is made. In that decision Judge Hunter ordered Appellant to remove from its employ 13 non-Indians he found to be hired improperly and instructed the parties to set a date for a hearing on fines and penalties. On July 31, 1987, Appellant filed a notice of appeal from that decision, as well as a request for a stay and a waiver of the appeal bond requirement. On August 18, 1987, Judge Lohah of the tribal court granted the Appellant's request for a stay but ordered it to post a $10,000 bond. On December 3, 1987, this court ruled on Appellant's appeal from Judge Lohah's decision of August 18, 1987. The preliminary injunction was stayed and no appellate bond was imposed for this appeal.

FACTUAL BACKGROUND

Since 1949, the Appellant has operated a phosphate processing plant on fee land within the exterior boundaries of the Fort Hall Reservation. The phosphate ore for that plant is mined from Indian and tribally owned land on the Fort Hall Indian Reservation and other areas of the region. In 1980 the Shoshone-Bannock Tribes enacted a Tribal Employment Rights Ordinance and set up a TERO office to administer a tribal employment program. The Ordinance requires employers located on the Reservation to give preference in employment, contracting, and subcontracting to Indians (See TERO § 4). It further required the employers to notify the TERO office of any vacancies

and to give the office five days to refer qualified Indians for those vacancies (See TERO § 4.8). Another TERO provision instructed the TERO Commission to negotiate compliance plans with each employer. The Appellant entered into an employment agreement with the tribal government in July 1981.

In late 1986, the Appellee became concerned about Appellant's compliance with the Ordinance. The Appellant agreed in the compliance plan to give the TERO office the first consideration to fill temporary positions. When Appellee confronted Appellant about the lack of Indian hires, the explanations were unsatisfactory. The explanations appeared to range from general affirmative action obligations to emergency conditions. The Appellee requested that Appellant correct the situation by increasing the seniority of Indians on the temporary recall list.[1] Sixteen non-Indians were hired by Appellant for temporary positions in 1985 and 1986. This Court has been informed that ten have been promoted to permanent positions.

I. CHALLENGE TO TRIBAL JURISDICTION

The threshold issue of FMC's appeal is its argument that the tribal government has no civil jurisdiction or regulatory authority over its business situated on (non-Indian owned) fee land within the exterior boundaries of

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[1] List is used for recall and promotion to permanent entry level positions. The senior person on the list is the first recalled for temporary work and the first promoted to a permanent job when a vacancy becomes available.

the Fort Hall Indian Reservation. In its analysis the Appellant relies in part upon the United States Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). The *Oliphant* decision focused exclusively upon criminal jurisdiction of tribal governments over non-Indian defendants who violate tribal criminal laws. Using an historical perspective, the Court in effect exempted non-Indians from criminal liability to tribal governments by noting the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians." Id. at 206. There is no comparable presumption concerning the civil jurisdiction of tribal courts. On the contrary, the different rule applicable to the assertion of tribal civil jurisdiction was recognized as early as 1855 in an opinion of the Attorney General cited by the Supreme Court in the *Oliphant* decision[2]. Certainly, the absence of tribal criminal jurisdiction over non-Indians provides no basis for disabling tribal governments from exercising civil jurisdiction over non-Indians and, since Congress is said to possess plenary power over the affairs of Indian tribes in the United States, then it has the federal responsibility when necessary to infringe upon the civil jurisdiction of Indian tribes. Absent Congressional action, civil jurisdictional limitations on tribes may be self-imposed. The tribal government in this instance imposed no limiting language concerning civil jurisdiction in the law and order code[3].

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[2] 7 Op. Att'y Gen. 174, cited, 435 US at 199.

[3] Shoshone Bannock Law and Order Code, Chapter 1, § 2.1 provides:

(Continued on following page)

The United States Supreme Court has long recognized that Indian tribes constitute political communities which enjoy substantial sovereign powers over both Indians and non-Indians within the exterior boundaries of Indian reservations. That point has been made by the Supreme Court time and time again. See *Williams v. Lee*, 358 U.S. 217, 223 (1939); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690-692 (1965); *Kennerly v. District Court*, 400 U.S. 423, 426-427 (1971); *United States v. Mazurie*, 419 U.S. at 557-558; *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152-154; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 140, 146-148; *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458

(Continued from previous page)

Civil Jurisdiction

The Shoshone Bannock Tribal Court shall have jurisdiction over all civil matters and actions as described in this Law and Order code, as well as civil jurisdiction over all ordinances that may hereafter be passed by the Fort Hall Business Council and amendments to this Code that may hereafter be adopted; and, any person may file a civil cause of action in the Shoshone Bannock Tribal Court wherein the cause of action arose within the exterior boundaries of the Fort Hall Reservation, and that Court shall have jurisdiction thereof. The civil jurisdiction of the Court is not limited by the amount or value in controversy, including interest.

U.S. 832, 837-838 (1982); *New Mexico v. Mescalero Apache Tribe*, slip op. 8-12.

In recent years, the Supreme Court has established several principles for determining whether or not a tribe's sovereign authority empowers it to exercise civil jurisdiction over non-Indians located on fee land within a reservation. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court held that tribes possessed that authority unless its exercise was inconsistent with the overriding interests of the federal government. In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court held that tribes do not retain that authority unless the non-Indian had entered into "consensual relations" with the tribe or the non-Indians' activities threaten or have some direct effect on the political integrity, the economic security or the health and welfare of the Tribe. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Supreme Court concluded that a tribe's civil jurisdiction is not diminished just because the activity takes place on non-Indian fee land.

In each Supreme Court decision noted above, either expressly or implicitly, tribal civil jurisdiction is recognized based upon a historical exercise of that jurisdiction through an understanding by the parties that tribal civil jurisdiction is applicable. Until this controversy, the Appellant had acknowledged that it was subject to the civil jurisdiction of the tribal government through contracts, leases, taxation and its initial efforts to comply with the TERO.

Not unlike many Indian reservations, the Fort Hall Indian Reservation has suffered chronically from a

depressed economy and an absence of sufficient employment opportunities for its tribal members. The preamble of its TERO reiterates its constitutional responsibility to protect the "general welfare." Enactment of this Ordinance is authorized by the tribal constitution and the spirit of the Ordinance reflects a concern for improving the employment status of members of the Shoshone-Bannock Tribes.

In democratic governments of the modern world organic documents are construed broadly so that governments maintain the ability to respond to the changes in social patterns and needs, population increases and diversities, technological improvements, and governmental developments. No less accord should be granted to the Constitution of the Shoshone-Bannock Tribes.

Because the TERO directly affects non-members of the Fort Hall Indian Reservation, it was subject to the review of the Secretary of the Interior pursuant to the Tribal constitution[4]. In a memorandum dated October 21, 1980, the Bureau of Indian Affairs stated that their Regional Solicitor's Office had reviewed the TERO and found no legal impediments to its approval. The

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[4] Shoshone-Bannock Constitution Article VI § 1 Subpart (l). To safeguard and promote the peace, safety, morals, and general welfare of the Fort Hall Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting nonmembers of the reservation shall be subject to review by the Secretary of the Interior.

Ordinance was then approved on behalf of the Secretary of the Interior[5].

The TERO has the effect of statutory law applicable to the employment policies and practices of employers within the exterior boundaries of the Fort Hall Reservation. Governed by its constitution, its statutory laws and the mandate of the Indian Civil Rights Act of 1968 (25 USC § 1301 et seq.), the Shoshone-Bannock tribal government regulates in the first instance the general employment policies and practices of its jurisdiction. This is a constitutional mandate and a governmental responsibility to protect the "general welfare."

The exercise of civil jurisdiction over Appellant in this case cannot be successfully questioned given the current state of the law and the historical and present relationship between the parties. Even when analyzed against the impotency of *United States v. Montana,* 450 U.S. 544 (1981) concerning the exercise of tribal civil jurisdiction over non-Indians on non-Indian fee land within the exterior boundaries of a reservation, FMC is convincingly subject to the civil jurisdiction of the tribal government in this controversy.

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[5] Text of Memorandum:

The Regional Solicitor's Office has reviewed the Fort Hall ordinance EXPT-80-54 (TERO) and found no legal objection to approval of this ordinance. Therefore, we find no reason to disapprove your approval and this ordinance is in full force and effect as of the date of your approval.

Signed Clifford Benson
Acting assistant Area Director

In *Montana,* the regulatory powers of the State of Montana on its fee land situated within the exterior boundaries of the Crow Reservation was pitted against the jurisdiction of the tribal government. In order to characterize regulatory jurisdiction in that instance with the State of Montana the United States Supreme Court looked sparingly upon the civil jurisdiction of tribal governments over non-Indians on non-Indian fee land within the exterior boundaries of the reservation. The Court created its "Montana" test to determine whether or not an Indian tribe could properly exercise civil regulatory jurisdiction over non-Indians on (non-Indian owned) fee land within the exterior boundaries of the reservation. According to *Montana,* the tribal government may exercise civil regulatory jurisdiction over Appellant if it has entered into "consensual relationships" with that government through commercial transactions, contracts, leases or other arrangements. Secondly, the tribal government retains inherent power to exercise civil jurisdiction over non-Indians on fee land within the exterior boundaries of the reservation when the conduct of those non-Indians threatens or has some direct effect upon the political integrity, the economic security, or the health or welfare of the tribe. supra at 366.

There is substantial evidence in the record below that since 1949, many "consensual relationships" have been struck between the tribal government and FMC. This extensive record of consensual relationships is viewed by this Court as firmly establishing a relationship between the tribal government and FMC as a linkage between a local government doing business with and having the

authority to regulate a business enterprise within its substantive and territorial limits[6].

Pursuing the course of *Montana*, this Court only needs to examine the "consensual relationship" established when FMC signed the 1981 Employment Agreement. This "consensual relationship" is one in which FMC declares by the writing that it is subject to the regulatory authority of the tribal government to promulgate and enforce employment policies and practices of firms doing business on the Fort Hall Reservation. This agreement was later canceled; however, that fact does not detract from the establishment of the consensual relationship between a government and a firm doing business in and consenting to the territorial and the civil regulatory jurisdiction of said government.

The TERO of 1980 is a legislative enactment of the tribal government for the purpose of regulating the employment policies and practices of all the employers doing business on the Fort Hall Indian Reservation. Since unemployment is a crisis situation on the Reservation, the tribal government has a substantial governmental interest and obligation to take measures to improve the negative employment conditions of its members by developing

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[6] Appellant's brief refers to Judge Callister of the local federal court for an affirmation of his arguments. If Judge Callister is offering advice and opinion in this case to Appellant's counsel, such conduct is extremely ill-advised and contrary to standard judicial ethics. Hopefully, Appellant's counsel is exaggerating the statements of Judge Callister. Appellant's brief quotes Callister as saying "there is a serious question as to how far the tribe can go in regulating FMC on the basis of the mining leases." (See Appellant's Brief at 21.)

employment opportunities. As long as the Ordinance invokes a compliance mechanism which assures the due process mandate of the Civil Rights Act of 1968, the tribal government is exercising valid civil regulatory powers. The "Compliance plan" provision of the TERO provides adequate assurances that employers would be treated fairly by the tribal government.

The second prong of *Montana* states that a tribal government retains inherent power to exercise civil jurisdiction over non-Indians on fee land within the exterior boundaries of the reservation when the conduct of those non-Indians threatens or has some direct effect upon the political integrity, the economic security or the health or welfare of the tribe.

From the record below it appears that the conduct of the Appellant has infringed substantially upon the political integrity of the tribal government. FMC has consented to tribal taxation and entered into agreements with the tribal government, including the 1981 employment agreement the acknowledgment of which by FMC indicates to this Court that FMC recognized the tribal government's civil jurisdiction over its activities on the reservation. The Appellant cannot arbitrarily stand outside the civil regulation of the tribal government at is convenience. Such conduct impacts negatively upon the tribal government in regulating others within its jurisdiction. Again, it is the province of either Congress or the tribal government to determine the parameters of tribal civil jurisdiction. The Appellant's effort to circumvent the regulatory authority of the tribal government by claiming that the tribal court has no jurisdiction to hear this case is a definite threat to the political integrity of this tribal government.

The tribal government has a compelling and overriding governmental interest in promulgating and implementing laws which regulate employment policies and practices of firms doing business on the Reservation. The interest here is the governmental obligation to improve economic conditions on the reservation and thereby develop a healthy economic integrity for the people of the Fort Hall Reservation. The measuring device for gauging that integrity is the assessment (continuing) of the economic status of the citizenry of the Reservation.

Chronic poverty is a historical fact of Indian country. Fort Hall is no exception. In the early 1800's many Indian tribes were forced to give up their homelands. In dramatic effort to seek peace tribes made enormous land concessions to the United States in return for the promise of peace. Tribes were ordered to exist within the confines of Indian reservations where the cancer of poverty has raged for generations. The TERO is an effort to improve the economic conditions of Indians of the Fort Hall Reservation. Appellant's challenge to the TERO is a threat to the economic integrity of the tribes. The tribal citizenry is the tribal government and community.

II. CHALLENGE TO THE TRIBES' POWER TO EFFECT FINES, PENALTIES, BONDS, RESTRAINING ORDERS AND REMOVE NON-INDIANS FROM THE EMPLOYE OF NON-INDIAN FIRM SITUATED ON FEE LAND WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION

AND

III. WHETHER OR NOT THE LOWER COURT DECISION IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE

Appellant argues that Article VI § 1 Subpart (l) of the Shoshone-Bannock Constitution does not empower it to

enact and enforce the TERO (see footnote 4). This Court is not convinced by that argument. The Appellant's brief attempts to demean the word "trade" and to deny it any relationship to the term "commerce." These are modern times and tribal governments must contend with commercial enterprises within their territories and the reasonable regulation of said commercial firms. The United States government is generations beyond merely "trading with the Indians." In any event, the tribal constitution provides for federal administrative review of tribal ordinances that affect non-Indians. The TERO was scrutinized by that review procedure and approved by that federal authority (see footnote 5).

This matter transcends a controversy being litigated between two parties. Community involvement in this case appears to run high. The record below suggests that racial tensions may underlie this controversy. If such a condition exists, it is imperative that the local federal court and the tribal trial court are not reduced to forums which perpetuate the anger and hostility of both the Indian and non-Indian communities. This is a controversy that can be resolved to the benefit of all parties. However, a viable resolution takes a serious good faith commitment by the parties involved to remove the ingredients of this controversy and move forward to improved conditions.

The constitutional authority of the tribal government to enact the TERO in question derives from its governmental responsibility to safeguard and promote the general welfare of the Fort Hall Reservation (see footnote 4). Ordinances of the tribal government amount to local laws duly promulgated and enforced to achieve constitutional goals. Genuine challenges to these laws may be made by

any "person" pursuant to the constitutional protections set forth in the Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.).

Once it is recognized that tribal governments "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation," *Montana*, 450 U.S. at 565, there is no reason to exclude the jurisdiction of the tribal courts in cases where substantive tribal law governs non-Indians. "The judicial powers of the tribe are coextensive with its legislative or executive powers." Cohen, *Handbook of Federal Indian Law* at 145 (1942). A non-Indian who is subject to tribal taxation must be answerable in tribal court to assure compliance with the tax regulation. It follows that the civil regulatory authority of the tribal government should not be acknowledged only at the convenience of the non-Indian. Certainly, the State of Idaho would not tolerate a business firm's practice of complying with its tax code and refusing to comply with its unemployment insurance regulations.

The Tribal Employment Rights Ordinance of the Shoshone-Bannock Tribes is a duly enacted law of its tribal government which has civil regulatory effect upon all employers on the Fort Hall Reservation including Appellant. The specific regulatory objective of the Ordinance is to improve the employment opportunities of Indians residing on or near the Fort Hall Reservation[7]. Because of the economic and social disability incurred by

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[7] The record indicates that the present TERO director solicits potential employees from other reservations. The ordinance does not provide for such solicitation.

Indians and caused by the forced removal to isolated reservations, tribal governments historically have struggled to provide gainful employment on reservations. A United States Supreme Court case in 1974 illustrates well the federal recognition of the need to provide special assistance to Indian tribal members in obtaining gainful employment in the federal Indian service. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld an employment preference for Indians in the Bureau of Indian Affairs. Similar preferences had existed in federal statutes since 1834. The Court held that the preference was not invidious race discrimination, but instead was a political classification designed to encourage Indian tribal self-government and to fulfill the special federal responsibility of Indians. The statutory preference consequently did not offend the equal protection principles of the Fifth Amendment.

The drafters of the TERO anticipated that the provisions of the Ordinance could not be applied as written to all employers on the Fort Hall Reservation without being adjusted to meet specific employer needs. Application of the law without adjustment could prove harsh and unreasonable in certain instances. To effectuate adjustment in the law so that it could be fairly applied, there is provision for compliance plans. The 1981 employment agreement between FMC and the tribal government is a compliance plan and not an agreement which supersedes the TERO. It is extremely unworthy to argue that an agreement made pursuant to a duly enacted statute of government thereby supersedes the law. These compliance plans implement the law, they do not supersede it.

Having negotiated a compliance plan, it appears that the parties believed that it was necessary to make adjustments to the law in order to avoid a harsh or unreasonable application to Appellant. However, after a dispute between the parties the employment agreement (compliance plan) was canceled by Appellee. Cancellation of said agreement does not render the Appellant subject to the previously determined harsh limitations that the text of the law would have upon the unique employment requirements of Appellant. In order to effectively regulate the employment procedures and practices of Appellant, the cancellation of the "1981 employment agreement" gives rise to the reasonable assumption that the tribal government intended or intends to negotiate another compliance plan to improve its regulatory authority over Appellant. Certainly, the cancellation of said agreement cannot be used as an effort to punish Appellant. The tribal government must afford the Appellant procedural due process in this or any other regulatory controversy concerning it. It is incumbent upon the tribal government and the Appellant to negotiate another employment agreement (compliance plan). This Court finds no validity in the argument that the 1981 employment agreement supersedes the Ordinance. The Ordinance can only be superseded by the tribal government's repeal of the law.

The Ordinance creates a duty for all employers of the Fort Hall Reservation to reasonably comply with its mandate to provide employment opportunities for Indians who reside on or near the Fort Hall Reservation. The TERO office is not merely a hiring hall agent. As the promoter of employment opportunities, the TERO office

is entrusted with the responsibility to develop training and advancement programs for the Indians placed through its efforts.[8]

The Appellant's argument that it must concern itself with its federal obligation to employing other minorities is extremely misleading. No data appears in the record below to evidence FMC's efforts to hire other minorities. Additionally, the Appellant's compliance plan allowed it to achieve other employment goals.

The equitable and legal powers of the tribal trial court provide it with the authority to impose civil remedies which are reasonable for curing the impediments of civil controversies properly brought before it. Although this case was properly brought before the trial court, the passage of time and the potential harm that might be inflicted upon the affected employees and their families by the imposition of the trial court's order at this time obligates this Court to vacate the trial court order and impose other directives.

The right of an individual to provide for his/her welfare and that of his/her family is an extremely important natural right and one that is protected by the Indian Civil Rights Act. That protection extends to "all persons" in Indian country. The lower court's order to dismiss workers hired by the Appellant has a theoretical basis and is provided for in the Ordinance. However, the order

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[8] The record below gives no indication that the TERO office has established productive training and career programs with reservation employers.

to dismiss is too harsh and impacts negatively upon the employees in question and their families.

The power of the trial court to impose other civil remedies is challenged by the Appellant. This Court can find no credibility in the argument. It amounts to a frivolous challenge upon the power of the court to impose civil remedies. However, in this case the order of fines and penalties by the trial court to be determined in a subsequent hearing is hereby vacated in the interests of justice. If the Appellant refuses to enter into a new compliance plan (employment agreement), then penalties will be assessed by this Court. However, the Appellant must be afforded a reasonable time in which to negotiate another compliance plan and make a good faith effort to honor it.

IV. CHALLENGE THAT THE TRIAL COURT FAILED TO JOIN INDISPENSABLE PARTIES

In deciding this case this Court does not need to reach this issue.

V. CHALLENGE AS TO SELECTIVE ENFORCEMENT OF TERO

In deciding this case the Court does not need to reach this issue; but, this amounts to a frivolous challenge. If the Appellant means "unfair enforcement," then that should be argued. Selective enforcement is not unfair per se. The contention here is unsupported in the Appellant's brief.

CONCLUSION AND ORDER

This Court has analyzed the record and testimony submitted concerning the issues argued in this appeal. The judgment made by this Court is based entirely upon the record submitted including the testimony offered at the appellate hearing.

The civil jurisdiction of the Shoshone-Bannock Tribal Government to apply the TERO to Appellant through the Ordinance's "compliance plan" provision is found to be appropriate and reasonable by this Court. Further, this Court finds that the Shoshone-Bannock Tribal Court possesses civil jurisdiction to hear this case. The ruling of the lower court is affirmed concerning jurisdiction.

The lower court's order to dismiss certain employees from Appellant's hire and to impose fines and penalties upon Appellant is overruled.

This Court hereby orders the parties negotiate another compliance plan (employment agreement) within sixty (60) days of the date of this order. The agreement shall include a meaningful training program for local Indians who show potential and have an interest in a career with Appellant. Advancement opportunities shall also be provided for in the agreement. Additionally, the plan should prescribe penalties for non-compliance.

If the parties fail to negotiate a workable plan within 60 days, they shall immediately submit their proposals to this Court for determination within thirty (30) days of a fair and reasonable compliance plan. Any non-compliance by Appellant to the Court authored plan shall be subject to the civil contempt powers of this Court.

The Appellant has been a presence on the Fort Hall Reservation for many years. It has profited significantly from that presence. This Court believes that the Appellant owes a moral and legal duty to strike a workable arrangement with the Shoshone-Bannock Tribal Government to implement the spirit of the TERO. FMC's leadership role in this region can promote harmony between the Indian and non-Indian communities, instead of disdain and mistrust.

The Shoshone-Bannock Tribal Government must also engage in activity to promote positive relations between the Indian and non-Indian communities of this region. A substantial step in that direction is to negotiate a compliance plan with FMC that fairly addresses the needs of all parties and one that does not require the intervention of this Court. The policies and procedures of the TERO Office must be upgraded to reflect meaningful employment programs that promote positive relationships between the tribal government and reservation employers.

In conformance with the assessments made in this memorandum opinion,

THIS ORDER IS HEREBY ENTERED ON THIS THE 19TH DAY OF MAY, 1988.

/s/ _____
Joseph A. Myers
Appellate Judge

Order and Compliance Plan of the Shoshone-Bannock Tribal Court, Appellate Division

SHOSHONE-BANNOCK TRIBAL COURT
Fort Hall Indian Reservation Idaho

APPELLATE DIVISION

FMC, Corporation Appellant, vs. Shoshone-Bannock Tribes, Acting by and Through its TERO Commission Appellee	)	Case No. INJ-87-31 C-87-64 ORDER and COMPLIANCE PLAN

Myers, J., Appellate Judge

This order and compliance plan are made pursuant to this court's order dated September 7, 1988. The jurisdictional and factual basis upon which the plan is imposed is set forth in this court's opinion in this case rendered on May 19, 1988. Since this court only heard testimony and reviewed evidence concerning the hiring controversy of individual Indian employees by FMC on the Fort Hall Reservation, this order and compliance plan addresses hiring practices concerning individuals. It has no force and effect upon issues of contracting and subcontracting nor does it address the Warbonnet Electric controversy.

The Shoshone-Bannock tribal government and FMC shall be bound by the provisions of the plan until the parties formally inform this court that they intend to modify the plan. If the parties agree in writing to modify the plan, at that time this court will permit the parties to negotiate a modification or draft a new plan. However, the parties must inform this court in writing of any

intention to deviate from this plan. Efforts by either party to circumvent this plan or render it unworkable shall be subject to the contempt powers of this court.

FMC is a major corporate entity that has a legal and moral obligation to fairly serve the employment needs of the Indian residents of the Fort Hall Reservation as reasoned by this court in its opinion of May 19, 1988. More importantly, it has a common sense obligation to promote community harmony in the areas where its work sites are located. In this instance, that obligation is being ignored and that attitude appears to be an origin of racial tensions both on and off the Fort Hall Reservation. Such tensions are unhealthy for the communities involved, impacting negatively upon the growing minds of children exposed.

The tribal government of the Fort Hall Reservation has a duty to protect the basic rights and interest of everyone within its territorial boundaries. This includes the duty to seek employment opportunities from firms doing business on the reservation for unemployed Indians who live on or near the Fort Hall Reservation. The enactment of the Tribal Employment Rights Ordinance (TERO) is the tribal government's effort to perform that duty. The compliance plan provision of the Ordinance seeks to fairly apply its mandate to reservation employers.

The parties to this litigation mutually agreed at one point that the TERO was too harsh for a fair regulation of Appellant's employment policies and practices concerning Indian hires. They decided to negotiate a workable compliance plan. Unfortunately, the plan failed its purposed, resulting in this litigation.

Since the parties are unable to resolve their differences in this matter, this court binds the parties to the compliance plan set forth below.

FMC COMPLIANCE PLAN

Indian Preference

FMC shall give preference to Indians for 75% of the initial hires and for 75% of the vacancies, regardless of level, where positions are not covered by, or cannot be filled pursuant to, the terms of FMC's collective bargaining agreement. This shall include vacancies in the positions not subject to a collective bargaining agreement and vacancies subject to a collective bargaining agreement for which there are no qualified employees to exercise their promotion rights under a collective bargaining agreement. Before filling any position with a non-Indian, FMC shall give the TERO office no less than three days to locate and refer a qualified local Indian. In emergency situations, FMC may request that the TERO office have less than three days; the TERO office shall liberally grant such requests. The TERO office shall recruit Indians who reside on or near the Fort Hall Reservation. Recruitment efforts to other reservations and other states shall stand outside the mandate of this plan.

Promotions

Local Indians shall be given preference for all positions in which the provision of such preference will not be in conflict with a collective bargaining agreement to which FMC is a party.

Training of Indians

For internal training programs conducted by FMC, one out of every three trainees shall be a local Indian if qualified Indian trainees are available. In addition, FMC shall assist the TERO office to establish a training program that will enable local Indians to prepare for employment with FMC. This program shall utilize any existing tribal training office and shall include local institutions of higher learning such as Idaho State University. These training efforts shall have the goal of preparing local Indians for projected vacancies at non-entry level positions for which FMC anticipates hiring from outside its existing workforce or will be open for bid internally where seniority is not the only determining factor. Each year, FMC shall project the vacancies for the coming three year period in an effort to determine vacancies it will not be able to fill from its existing workforce, and then shall develop a comprehensive plan to train local Indians for such positions. When they are available, FMC shall place no less than 10 Indian graduates from the training program each year in vacancies at FMC. First preference among local Indians shall go to those who were laid off because of the closing of the Gay Mine and those on FMC's temporary recall list. FMC shall bear the cost of such training programs. However, some costs may be spread by persuading the Bureau of Indian Affairs to participate in this vocational training program.

Pre-Employment Screening and Orientation

With assistance from FMC, the TERO office shall screen employees referred to FMC to ensure that they

qualify for the positions of the referral. In addition, the TERO office shall give all FMC referrals a work orientation to afford them the best opportunity for job success.

Counseling

Whenever FMC has determined that a local Indian employee referred by the TERO office is not performing adequately and is in danger of being dismissed, it shall notify the TERO office about the problem. The TERO office shall immediately provide job counseling to that employee. FMC agrees not to terminate any Indian employee until the TERO office has been given an opportunity to provide such counseling, unless immediate termination is determined by management to be necessary.

Community Education

The TERO office with the assistance of FMC shall develop and deliver community education programs on the Fort Hall Reservation which explain the preference program and the opportunities it makes available to tribal members. The programs shall emphasize that preference requires qualified workers who will perform satisfactorily on the job. The intent of this plan is to identify local Indians who have a real interest in gaining the skills necessary to become effective member of Appellant's workforce. Employment opportunities may be provided but hard work is determinative of employment success.

High School Presentations

FMC and the TERO office shall make presentations at the local high schools about the opportunities available at

FMC. They shall identify Indian students interested in working at FMC and offer them career counseling, summer jobs at FMC and other assistance to encourage Indian high school students to consider careers at FMC's operation at Fort Hall.

TERO Fee

FMC shall pay a TERO fee in an amount equal to 1/2 of 1% of its total annual payroll minus that portion of the payroll paid to Indian employees.

Non-Compliance

The spirit of this plan is to afford employment opportunities to Indians who reside on or near the Fort Hall Reservation where the unemployment rate soars far beyond that of the general Pocatello area. The resources exploited from the Fort Hall Reservation by Appellant and its contractors amount to enormous economic gain to off-reservation interests. Aside from the TERO and its application herein and the jurisdictional determination made by this court, there is a profound human interest obligation here that is incumbent upon FMC to honor this compliance plan. To do otherwise is not honorable.

If the TERO office has good cause to believe that FMC has seriously violated any requirements of this compliance plan it shall notify FMC and shall seek to resolve the alleged violation through negotiations and other cooperative methods. If such efforts fail, this court shall impose appropriate sanctions

In conformance with the assessments made herein,

THIS ORDER AND COMPLIANCE PLAN ARE HEREBY ENTERED ON THIS THE 10TH DAY OF OCTOBER, 1988.

/S/
Joseph A. Myers
Appellate Judge

Order of the
United States Court of Appeals
for the Ninth Circuit
(Denying petition for rehearing and
rejecting the suggestion for a rehearing *en banc*)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FMC Plaintiff-Appellee, v. SHOSHONE-BANNOCK TRIBES, et al acting by and through its TERO COMMISSION aka THE SHOSHONE-BANNOCK TRIBES TRIBAL EMPLOYMENT RIGHTS COMMISSION and its individual Commissioners, ARNOLD APPENAY, AL TIMSANICO, MARVIN OSBORNE and R. WILIS DIXEY; SHOSHONE-BANNOCK TRIBAL COURT; HONORABLE CHARLES H. LONAH; HONORABLE ROBERT GONZALES, Defendants-Appellants.	CA No. 89-35349 DC No. CV 87-4059-MJC (District of Idaho) ORDER (Filed October 24, 1990)

Before: FARRIS, PREGERSON, and BOOCHEVER, Circuit Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris and Pregerson have voted to reject the suggestion for a rehearing en banc and Judge Boochever recommends rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Tribal Employment Rights Ordinance

EMPT – 80 – S4

TRIBAL EMPLOYMENT RIGHTS ORDINANCE
FORT HALL INDIAN RESERVATION

EMPT-80-S4

Adopted by the Shoshone-Bannock
Business Council on July 22, 1980.

Approved by the Superintendent
of the Fort Hall Agency on
July ___, 1980.

TRIBAL EMPLOYMENT RIGHTS ORDINANCE
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TRIBAL EMPLOYMENT RIGHTS ORDINANCE FORT HALL INDIAN RESERVATION

Preamble

WHEREAS, the Fort Hall Business Council is the governing body of the Shoshone-Bannock Tribes of Idaho by authority of the Constitution and By-laws of the Tribes approved on April 30, 1936 by the Secretary of the Interior; and

WHEREAS, the Council is authorized to protect the health, security and general welfare of the Shoshone-Bannock Tribes, to exclude from the Fort Hall Indian Reservation persons not entitled to remain therein, to regulate all commerce inside the Fort Hall Indian Reservation and to levy assessments or license fees upon all persons doing business within the Fort Hall Indian Reservation pursuant to the Tribal Constitution; and

WHEREAS, jobs in private employment on or near the Fort Hall Indian Reservation are an important resource for Indians; and

WHEREAS, Indians have unique employment rights under Congressional enactments designed to combat employment discrimination against American Indians; and

WHEREAS, the Council has the duty and the inherent sovereign power to guarantee and implement the unique employment rights of Indians; and

WHEREAS, regulation of tribal employment rights requires the enactment of an Employment Rights Ordinance which establishes an Employment Rights Program and Employment Rights Commission;

NOW, THEREFORE, BE IT ENACTED, that the Fort Hall Business Council does hereby promulgate and enact the following employment ordinance:

Section 1. General Provision and Purposes

1.1 Name: This ordinance shall be known as the "Fort Hall Employment Rights Ordinance."

1.2 Findings: The Fort Hall Business Council finds that employment discrimination against Indians persists on the Fort Hall Indian Reservation despite a large number of Indian and non-Indian owned businesses employing skilled and non-skilled workers inside the Reservation. The Council further finds that jobs in private employment on or near the Reservation are an important resource to which Indians have unique employment rights under Congressional enactments. The Council finds that its duty to guarantee and implement the unique employment rights of Indians necessitates enactment of an employment rights ordinance which establishes an Employment Rights Program and Employment Rights Commission to achieve its goals and policies.

Section 2. Definitions

2.1 Chairman: The term "Chairman" shall mean Chairman of the Fort Hall Employment Rights Commission.

2.2 Commission: The term "Commission" shall mean the Fort Hall Employment Rights Commission.

2.3 *Commissioner:* The term "Commissioner" shall mean a member of the Fort Hall Employment Rights Commission.

2.4 *Council:* The term "Council" shall mean the Business Council of the Shoshone-Bannock Tribes.

2.5 *EEOC:* The term "EEOC" shall mean the Equal Employment Opportunities Commission of the United States.

2.6 *Employer:* The term "Employer" shall mean any person, company, contractor, subcontractor, or other entity located on or engaged in work while on the Reservation, employing five or more persons. The term "employer" excludes federal, state, and county governmental agencies, but includes tribal agencies, and contractors and subcontractors of all governmental agencies.

2.7 *Engaged in Work on the Reservation:* An employer is "engaged in work on the Reservation" if during any portion of a business enterprise or specific project, contract or subcontract, he or any of his employees spends any of his time performing work within the exterior boundaries of the Reservation on a continuing basis.

2.8 *FEPC:* The term "FEPC" shall mean the Fair Employment Practices Commission of the United States.

2.9 *Fort Hall Employment Rights Officer:* The terms "Fort Hall Employment Rights Officer or "Officer" shall mean the person appointed by the Council to carry out the daily enforcement of the Fort Hall Employment Rights Program.

2.10 *Hiring Preference for Individual Indians:* The term "hiring preference for individual Indians" shall mean a

qualified Indian person must be hired before a qualified non-Indian person, whenever an opening is available.

2.11 Contracting Preference for Indian-owned Businesses: The term "Contracting Preference for Indian-owned Businesses" shall mean that contracting and subcontracting preference shall be given to qualified Indian-owned businesses.

2.12 Indian: The term "Indian" shall mean all persons residing on or adjacent to the Fort Hall Indian Reservation, who are either (a) enrolled in any federally recognized Indian tribe or (b) possessed of 1/4 or more degree of Indian blood of any federally recognized tribe.

2.13 Indian-owned Business: The term "Indian-owned Business" shall mean any business entity of which at least 51% is owned by Indian(s).

2.14 Located on the Reservation: Any employer is "located on the Reservation" if during any portion of a business enterprise or specific project, contract or subcontract, he maintains a temporary or permanent office or facility within the exterior boundaries of the Reservation.

2.15 OFCCP: The term "OFCCP" shall mean the Office of Federal Contact Compliance Programs of the United States.

2.16 Religious Belief: The term "religious belief" shall be defined according to the findings of the American Indian Religious Freedom Act of 1978.

2.17 Reservation: The term "Reservation" shall mean the Fort Hall Indian Reservation, Idaho.

2.18 Responsive bidder: The term "responsive bidder" shall mean a party who submits a bid which meets the requisite specifications of the party letting the bid.

2.19 Secretary: The term "Secretary" shall mean the Secretary of the Interior or his duly authorized representative.

2.20 Temporary Facility: The term "temporary facility" shall mean a housing structure of any sort which is located on the Reservation for at least 24 hours.

2.21 Tribal Trial Court: The terms "Tribal Trial Court" and "Trial Court" shall mean the Trial Division of the Shoshone-Bannock Tribal Court.

2.22 Tribal Appellate Court: The terms "Tribal Appellate Court" or "Appellate Court" shall mean the Shoshone-Bannock Court of Appeals.

2.23 Tribal Member: The term "tribal member" and the term "member" shall mean any person who is a duly enrolled member of the Shoshone-Bannock Tribes, unless the context clearly indicates otherwise.

2.24 Tribes: The term "Tribes" shall mean the Shoshone-Bannock Tribes.

Section 3. Fort Hall Employment Rights Commission

3.1 Appointment: The Fort Hall Employment Rights Commission shall be comprised of three members appointed by the Fort Hall Business Council.

3.2 Terms of Office: The members of the Commission shall initially hold office for periods of one, two and three years, respectively; after the original terms of office have

expired, each member shall hold office for two years. The Council may reappoint any member to an additional term or terms of office.

3.3 Removal from Office: A Commissioner may be removed by the Business Council only for good cause shown after notice and hearing by the Council.

3.4 Vacancy and Interim Appointment: If a Commissioner shall die, resign, be incapacitated or permanently leave the Reservation or be removed from office, a vacancy on the Commission shall be created automatically, and the unexpired term shall be filed [sic] by appointment of the Business Council.

3.5 Chairman: The Chairman of the Commission shall be elected by the Commission on an annual basis. The Chairman shall preside at all formal and informal meetings of the full Commission.

3.6 Duties and Powers of Commission: The Commission shall administer the Employment Rights Program of the Fort Hall Indian Reservation in accordance with this Ordinance. In addition to all the specific powers conferred upon it by other sections of this Ordinance, the Commission shall also have the following powers:

(a) To hire and remove Commission employees other than the Fort Hall Employment Rights Officer, and to pay salaries under a salary schedule established by the Council;

(b) To establish rules and regulations governing all activities of the Commission and Officer;

(c) To expend funds appropriated by the Council for the Fort Hall Employment Rights Program;

(d) To obtain funding, with Council approval, from federal, state or other sources to supplement Council appropriations;

(d) [sic.] To delegate authority to the Officer in accordance with Section 3.8 of this Ordinance; and

(f) To take such other actions consistent with this Ordinance as the Commission may deem necessary to achieve the purposes and objectives of the Fort Hall Employment Rights Program established by this Ordinance.

The Commission may hold such formal and informal meetings, and regulate the times and procedures thereof, as it may deem necessary in order to carry out effectively its duties and powers under this Ordinance. The Commission shall attempt whenever possible to administer this Ordinance and execute its powers hereunder by a consensus approach. If a consensus cannot be achieved, the affirmative vote of at least two Commissioners shall be required to render effective any decision or action of the Commission, and the Chairman shall be entitled to vote on any decision or action. All written agreements or plans, directives, complaints, and appeals which the Commission is authorized or required to issue or file hereunder shall bear the signature of at least two Commissioners.

3.7 Appointment and Removal of Fort Hall Employment Rights Officer: The Council shall appoint the Officer to serve on a full-time basis as the chief executive and staff director for the Commission. The Officer may be removed by the Council for good cause shown after notice and

hearing by the Council. The Council may consider Commission recommendations concerning appointment and removal of the Officer.

3.8 Duties and Powers of Officer: Subject to the supervision and direction of the Commission, the Officer shall exercise all those duties and powers under this Ordinance which may be delegated to the Officer by the Commission; *provided, however,* that any decision which the Commission is authorized or required to make hereunder, including the issuance or filing of the written materials listed in Section 3.6 hereof, shall not be so delegated. Routine or administrative correspondence not involving any decision-making powers of the Commission may be delegated by it to the Officer.

As soon as practicable after their appointment, the initial Commissioners shall define by rule or regulation the specific powers and duties hereunder which the Officer shall exercise. Pending the appointment of the initial Commissioners, the Council may act as it deems necessary to exercise the duties and powers conferred by this Ordinance upon the Commission, including delegation of interim authority by the Council to the Officer.

Section 4. Fort Hall Employment Rights Program

4.1 Scope of Program: All employers are required to give preference to Indians in hiring, training, promotion, lay-offs, and all other aspects of employment, contracting and subcontracting, and all employers must comply with this Ordinance as well as any rules, regulations, and directives of the Commission.

The above requirements shall apply only to an employer located or engaged in work while on the Reservation. When an employer has already agreed in a contract, lease or other document to give preference to Indians, this Ordinance and authorized Commission rules, regulation, and directives shall define the specific minimum obligations of the employer pursuant to such written agreement.

4.2 Contractors and Subcontractors: The Indian preference requirements contained in this Ordinance shall be binding on all contractors and subcontractors of employers, regardless of tier, and shall be deemed a part of all resulting subcontract specifications. The employer shall have the initial and primary responsibility for insuring that all contractors and subcontractors comply with these requirements, and both the employer and his contractors or subcontractors shall be subject to the civil remedies set forth in Section 6 of this Ordinance if the contractor or subcontractor fails to comply.

4.3 Employment and Hiring Preference – Written Compliance Plans: Under Section 4.1 hereof, each employer must give preference to qualified Indians in all hiring and employment on the Reservation. To facilitate the implementation of this preference requirement, the Commission shall attempt to conclude a written agreement or "Compliance Plan" with each employer. Such Plan shall set forth goals concerning the number of Indians each employer shall make a good faith effort to employ on-Reservation during any year. Numerical goals shall be established for each craft, skill area, job classification, etc., used by the employer, including but not limited to,

all administrative, supervisory and professional categories. Such goals shall be based upon surveys of the available Indian work force pool and of projected employment and job training opportunities on-Reservation.

4.3A Compliance Plans for New Employers: With respect to employers who shall locate or engage in work on-Reservation after the effective date of this Ordinance, Compliance Plans shall establish hiring and employment goals for the entire work force. Each new employer shall meet with the Commission as long before he actually begins work as possible and shall furnish the Commission with a precise list of the number and kinds of employees he expects to employ. The Commission and the employer shall then conclude a Compliance Plan after consideration of any special factors and circumstances the employer wishes to present. Every new employer shall be required to sign a Compliance Plan before commencing any work on the Reservation.

Plans for new employers shall establish the goal of 100% Indian employment in each job classification if: (1) qualified Indians are reasonably available when the Plan is adopted to fill all job positions anticipated by the new employer in the job classification; or (2) qualified Indians can reasonably be expected to become available to fiil all such positions during the one-year period of the Plan.

If qualified Indians are not thus available, then Plans may provide for goals of less than 100% Indian employment in affected job classifications. Such goals shall be expressed in terms of work hours of Indian employment as a percentage of the total hours worked by the

employer's work force on the Reservation in the job classification involved.

4.3B Compliance Plans for Existing Employers: With respect to employers who have located or engaged in work on-Reservation prior to the effective date of this Ordinance, Compliance Plans shall establish hiring and employment goals for new employees expected to be employed during the one-year period of any Plan. Each existing employer shall meet with the Commission after due notice by the latter and shall furnish the Commission with a reasonably specific list of the number and kinds of new employees he expects to employ in the ensuing year. The Commission and the employer shall then conclude a Compliance Plan after consideration of any special factors and circumstances the employer wishes to present.

Plans for existing employers shall establish the goal of 100% Indian employment for new hiring in each job classification if qualified Indians can reasonably be expected to become available to fill all such new positions during the duration of the Plan. If qualified Indians are not thus available, then Plans may provide for goals of less than 100% Indian employment in affected job classifications. Such goals shall be expressed in terms of a percentage of the new employees expected to be employed during the ensuing year.

4.3C Revision of Compliance Plans: Monthly Employer Reports: The Commission shall meet at least annually with each new and existing employer to review the goals of every Compliance Plan. Any Plan shall be revised at any time, after discussions by the Commission and employer,

when necessary to reflect changes in the number of qualified Indians available or changes in employer hiring practices.

Each employer who has agreed to a Compliance Plan shall submit a monthly report to the Commission on a form provided by the latter, indicating: (1) the number of Indians in his work force; (2) how close he is to meeting his goals; (3) the number of persons hired or fired during the month and the affected job positions; and (4) any other information specified by the Commission and reasonably necessary in monitoring the employer's efforts to abide by the Compliance Plan.

4.3D Judicial Review of Plans: Every new and existing employer shall make good faith efforts to agree with the Commission on: (1) a written Compliance Plan under Sections 4.3A or 4.3B, respectively; and (2) any revisions in such Plan that became necessary in light of the changed circumstances listed in Section 4.3C. If an employer and the Commission are unable after reasonable efforts to reach agreement on a Plan or any revisions thereof, then the Commission shall file a complaint with the Tribal Trial Court pursuant to Section 5.3 of this Ordinance. At a hearing conducted under Section 5.7 hereof, that Court shall consider all relevant facts presented by the Commission and employer to justify differing employment goals. The Trial Court shall then order a Compliance Plan or revisions thereof containing specific goals consistent with the hearing evidence and with the provisions of this Ordinacne [sic.]. Such order may be appealed to the Tribal Appellate Court pursuant to Section 5.8 hereof. Any employer who refuses to sign a Compliance Plan or revisions thereof ordered by the Trial

Court or the Appellate Court shall be deemed in violation of this Ordinance, and the Commission shall proceed against such employer under the complaint procedure in Section 5.2 hereof.

4.3E Judicial Review of Compliance Plan Violations: Every employer shall be required to make good faith efforts to attain the employment goals set forth in any Compliance Plan or revisions thereof. Whenever the Commission has reason to believe that any employer is violating this Ordinance by failing to make such efforts, the Commission shall first attempt to resolve the matter informally. If informal contact is unsuccessful, the Commission may file a complaint against the employer pursuant to Section 5.2 hereof. At a hearing conducted under Section 5.7 hereof, the Commission shall bear the initial burden of proving that an employer has failed or is failing to make good faith compliance efforts. Upon *prima facie* proof of such failure, the employer shall then bear the burden of proving that he has made or is making good faith efforts to meet his employment goals. It shall not be an excuse for such failure that the union with which the employer has a collective bargaining agreement providing for exclusive referral failed to refer Indians. If the Trial Court concludes, after consideration of all relevant evidence, that an employer has failed to carry the foregoing burden of proof, then that Court may order one or more of the civil remedies set forth in Section 6.2 of this Ordinance. The remedial order may be appealed to the Tribal Appellate Court under Section 5.8 hereof.

4.4 Training preference and Training Programs: Under Section 4.1 hereof, each employer must give preference to

qualified Indians in training or apprenticeship programs or positions on-Reservation. Every employer shall employ the maximum number of Indian trainees or apprentices possible. The ratio of Indian trainees to fully qualified workers shall be set by the Commission after consultation with the employer. For construction projects, the number of Indian trainees shall be no less than the minimum ratio established by the Department of Labor. Every employer with a collective bargaining agreement with a union shall make good faith efforts to obtain agreement from the union to establish an advanced journeyman upgrade and apprenticeship program.

The Tribes shall appropriate such funds as are necessary and available to establish training programs to prepare Tribal members for job opportunities developed pursuant to this Ordinance and the Fort Hall Employment Rights Program. The Commission shall establish a construction-worker trainee program and obtain certification for the program from the Department of Labor. Every employer may be required by the Commission to participate in Tribally-funded or Federally-funded programs to assist Indians to become qualified in the various job classifications used by the employer unless the employer can demonstrate that his refusal to so participate is clearly justified by business necessity. In addition, pursuant to Section 8 hereof, the Commission may recommend to the Council adoption of economic or other legitimate incentives to encourage employer-funded training programs for the benefit of Indians.

4.5 *Preference in Promotions:* Under Section 4.1 hereof, every employer must give preference to qualified Indians

in all promotion opportunities on-Reservation. To facilitate this requirement, employers shall be required to encourage Indians to seek promotion opportunities and to provide adequate advance notice of such opportunities to existing Indian employees. For every supervisory position filled by a non-Indian, the employer shall file a report with the Commission setting forth: (1) the efforts made to inform Indian workers about the positions; (2) the names of any Indians who applied for the position; and (3) the reasons why each Indian who applied was not hired for that position.

4.6 Preference in Lay-Offs: Under Section 4.1 hereof, every employer must accord preferential protection to Indians in all lay-offs and reductions in force on-Reservation. Therefore no Indian employee shall be terminated as a result of lay-off or reduction in force if a non-Indian employee in the same job classification is still employed; the non-Indian must first be terminated if the Indian possesses the threshold qualifications for the job classification. If an employer lays off workers by crews, all qualified Indian employees shall be transferred to crews to be retained so long as non-Indians in the same job classifications are employed elsewhere on the job site.

4.7 Job Qualifications and Personnel Requirements: With respect to hiring, training, promotion, lay-offs, and all other aspects of employment, contracting, and subcontracting, every employer is prohibited from using job qualification criteria or personnel requirements which bar Indians from employment unless such criteria or requirements are required by business necessity. If the Commission has reason to believe that any employer is violating the foregoing prohibition, it shall first attempt to meet

with the employer and resolve the matter informally. If such informal contact is unsuccessful, the Commission may file a complaint against the employer pursuant to Section 5.2 hereof. At the hearing before the Trial Court pursuant to Section 5.7 hereof, the Commission shall bear the initial burden of proving that a job qualification or personnel criterion is not required by business necessity. If the Commission presents *prima facie* proof in this respect, the employer shall then bear the burden of proving business necessity. If the Trial Court finds that the employer has not met this burden, the Court: (1) shall order the elimination or modification of the affected job qualification criterion or personnel requirement; and (2) may order any other civil remedy against the employer pursuant to Section 6.2 hereof.

In implementing this section, the Commission shall be guided by principles established in the EEOC Guidelines, particularly 25 CFR Parts 1604 through 1607, but the Commission may impose additional requirements by rule or regulation beyond those established by the EEOC in order to eliminate employment barriers unique to Indians and the Reservation. In addition, every employer shall make a reasonable accommodation to the religious beliefs of Indian employees, and the Commission by rule or regulation may define the specific nature of such accommodation.

4.8 Tribal Hiring Hall: The Commission shall establish and administer a Tribal Hiring Hall to assist the Commission and employers in placing Indians in job positions. An employer may recruit and hire workers from whatever sources are available to him and by whatever process he chooses; *provided, however,* that an employer may

not hire a non-Indian until he has given the Commission a reasonable time to locate a qualified Indian *and* the Tribal Hiring Hall has certified in writing that a qualified Indian is unavailable to fill the job position.

For purposes of this section, "reasonable time" shall be defined as follows: (a) for construction jobs, the Commission shall be given 48 hours to locate and an additional 12 hours to refer a qualified Indian; (b) for all other kinds of employment, the Commission shall have five (5) working days to locate and refer a qualified Indian. The Commission may grant a written waiver of these time periods upon a showing by the employer that such time periods impose an undue burden upon him. An employer subject to a collective bargaining agreement with a union shall be exempt from this procedure if the union agrees to place on its referral list all names supplied to it by the Commission. However, if any union fails to meet its obligation to refer Indians to an employer, the Commission may require the employer to accept Indian referrals from sources other than the union.

If any non-Indian worker is found to be employed in a job in violation of this section, the Commission in writing shall direct the employer to remove such worker immediately. If an employer fails to comply with such directive within 24 hours after receipt thereof, the Commission may file a complaint against the employer pursuant to Section 5.2 hereof. The Trial Court may expedite a hearing on the complaint without regard to the notice limits in Section 5.6 hereof so long as the employer is afforded reasonable opportunity to prepare for the hearing. After a hearing conducted under Section 5.7 hereof, the Trial Court may order: (1) the immediate removal of

the non-Indian employee involved; and (2) any other civil remedy set forth in Section 6.2 hereof.

4.9 Preference in Contracting and Subcontracting: Under Section 4.1 hereof, every employer must give preference to Tribally-owned or Indian-owned businesses in the award of any contract or subcontract to be performed on-Reservation. The Commission shall maintain a list of such businesses which shall be supplied to employers for their use. Employers shall not be required to take any extraordinary measures to identify or locate Tribally-owned or Indian-owned businesses.

Preference in the award of contracts or subcontracts by all employers shall be implemented by the bidding procedures set forth in Sections 4.9A and 4.9B.

4.9A Limited Bidding by Tribally-Owned and Indian-Owned Businesses: Every employer letting or soliciting bids for a contract or subcontract to be performed on-Reservation shall comply with the following procedures:

(1) The employer shall provide reasonable notice to all Tribally-owned and Indian-owned businesses within a reasonable vicinity of the Reservation of their right to bid upon the contract or subcontract involved. The employer shall cooperate in this respect with the Commission which may specify by rule or regulation the nature of the foregoing notice.

(2) If thereafter one or more Tribally-owned or Indian-owned businesses reasonably notify the employer of an intent to bid upon the contract or subcontract, then the employer shall only accept submission of bids from such businesses.

(3) If one or more responsive bids are thereafter received, award shall be made to the lowest responsive bidder if the bid price is determined by the employer to be reasonable.

(4) If the employer determines the lowest responsive bid to be unreasonable as to price, the employer shall attempt to negotiate a reasonable price with the low bidder. If a reasonable price cannot be agreed upon with the low bidder, the employer shall attempt to negotiate a reasonable price with any other responsive bidders in order of ascending bid amounts.

4.9B Open Bidding with Preference for Tribally-Owned and Indian-Owned Businesses: If a contract or subcontract is not awarded after full compliance with Section 4.9A, then the employer may let or solicit bids thereon by any business. In such open bidding process, Tribally-owned and Indian-owned businesses shall be entitled to any contracting or subcontracting preference which is defined by:

(1) any rule or regulation adopted by the Commission and approved by the Council; or

(2) any Act of Congress, Presidential Executive Order, or federal agency rule, regulation, or order.

4.9C Consultation and Cooperation with Federal Agencies: The Commission shall consult and cooperate with each affected federal agency in an effort to maximize contracting and subcontracting preference under Sections 4.9A and 4.9B.

4.10 Counseling and Support Programs: The Commission shall establish counseling and other support programs to assist Indians to retain employment. Every

employer shall be required to cooperate reasonably with the Commission regarding such programs.

4.11 Summer Students: Every employer shall give Indian students preference in consideration for summer student employment. Every employer shall also make every reasonable effort to promote after-school, summer and vacation employment for Indian students.

4.12 Recognition of Unions: Nothing in this Ordinance nor any Commission activity authorized hereby shall constitute official Tribal recognition of any union or Tribal endorsement of any union activities on the Reservation.

Section 5. Complaint and Hearing Procedures

5.1 Trial Court Jurisdiction: The Shoshone-Bannock Tribal Court, Trial Division, shall have original jurisdiction with respect to all complaints and hearings authorized by this Ordinance. The Court Administrator and Chief Judge may adopt such Rules of Court as they jointly deem necessary to implement the complaint and hearing procedures set forth herein.

5.2 Commission Complaint Procedure for Alleged Violations: Whenever the Commission believes that an employer or union has failed to comply with this Ordinance or any rules, regulations or directives of the Commission, it may file a complaint with the Trial Court. Such complaint shall contain:

(1) a concise statement of the factual and legal grounds for the alleged violation;

(2) reasonable notice of the evidence to be presented by the Commission at the hearing; and

(3) an indication of the specific remedies for the violation, pursuant to Section 6.2 hereof, which the Commission may recommend to the Court at the hearing upon the complaint.

A copy of the complaint and a notice of the hearing thereon shall be served upon the alleged violator pursuant to Section 5.6 hereof. The Commission shall use all reasonable means to achieve an informal settlement of the matter before filing a complaint with the Trial Court.

5.3 Commission Complaint Procedure for Compliance Plan Disputes: Whenever the Commission and any employer are unable after reasonable efforts to reach agreement on a Compliance Plan or any revisions thereof pursuant to Sections 4.3A to 4.3C hereof, the Commission shall file a complaint with the Trial Court. Such complaint shall contain:

(1) the specific hiring and employment goals proposed by the Commission for inclusion in such Plan or any revisions thereof; and

(2) a concise statement of the factual and legal grounds for the proposed goals.

A copy of the complaint and a notice of the hearing thereon shall be served upon the affected employer pursuant to Section 5.6 hereof.

5.4 Individual Complaint Procedure: If any Indian believes (A) that his rights have been violated by the failure of an employer to comply with this Ordinance or any rules, regulations, or directives of the Commission, or (B) that he has been discriminated against by an employer because he is an Indian, he shall first contact the Commission concerning the alleged violation. The Commission shall then investigate the allegations

promptly and attempt to achieve an informal settlement of the matter. If such a settlement cannot be reasonably achieved, the Commission may file a complaint with the Trial Court pursuant to Section 5.2 hereof. If the Commission declines to file such a complaint, the affected Indian may do so and his complaint shall contain the basic information set forth in Section 5.2.

If any employer fires, lays off, or penalizes in any manner any Indian in retaliation for exercising the individual rights recognized in this Section or any other provisions of this Ordinance, the employer shall be subject to the civil remedies set forth in Section 6.2 hereof.

5.5 Employer or Union Complaint Procedure: If any employer or union believes that any provision of this Ordinance or any rule, regulation, or directive of the Commission is illegal or erroneous, the employer or union shall first contact the Commission to attempt an informal settlement of the matter. If such a settlement cannot be reasonably achieved, the employer or union may file a complaint against the Commission with the Trial Court. Such complaint shall contain:

(1) a concise statement of the factual and legal grounds for the alleged illegality or error;

(2) reasonable notice of any evidence to be presented by the employer or union at the hearing; and

(3) the nature of the relief or remedies sought from the Court pursuant to Section 6.3 hereof.

Service of the complaint and a notice of the hearing thereon shall be made upon the Commission pursuant to Section 5.6 hereof.

5.6 Notice of hearing and Answer to Complaint: A copy of any complaint filed under Sections 5.2 to 5.6 hereof, as well as a written notice of hearing thereon, shall be served by the clerk of the Trial Court upon the respondent named in the complaint not less than 30 days prior to the hearing. The clerk shall make such service personally or by certified mail.

Whenever an employer or union is named as respondent in any complaint, the notice of hearing shall contain: (1) a brief statement of the reason for and time of the hearing; (2) notice of the right to file a written answer to the complaint at any time prior to the hearing; (3) notice that the Commission may be represented at the hearing by a Tribal Court advocate and/or general counsel for the Tribes; and (4) notice of the respondent's rights (a) to be present at the hearing, (b) to present testimony of witnesses and other evidence, (c) to cross-examine opposing witnesses and to examine other evidence presented by the complainant at the hearing, (d) and to be represented by counsel at the expense of the respondent.

Whenever a complaint by an employer or union names the Commission as respondent, the notice of hearing shall merely indicate the date and purpose thereof. Upon request of any complainant or the Commission, a similar notice shall be sent by the Clerk to any interested parties other than the respondent.

Any respondent may file a written answer to the complaint at any time prior to the commencement of the hearing. Such answer shall contain a brief response to the factual and legal matters set forth in the complaint.

5.7 Trial Court Hearing Procedures: A hearing shall be held upon any complaint filed hereunder with the Trial Court unless the complaint is withdrawn prior to the hearing. That Court may make reasonable efforts, consistent with judicial impartiality, to encourage affected parties whenever possible to resolve any complaint by informal means.

Hearings before the Trial Court shall be governed by the following rules of procedure:

(1) Unless otherwise provided in this Ordinance, all rules of civil procedure generally applicable in civil actions before the Trial Court shall be followed:

(2) The Commission may have the advice and assistance at the hearing of a Tribal Court advocate and/or General Counsel for the Tribes;

(3) An employer, union, or individual Indian complainant may be assisted and advised at the hearing by an attorney at their own expense;

(4) Any matter that must be proven shall be done so by a preponderance of the evidence;

(5) The Court may take immediate action at the conclusion of the hearing or may take the matter under advisement for a reasonable period;

(6) The Court shall render its decision by written order which shall contain specific findings of fact, conclusions of law, and any remedies pursuant to Section 6 hereof which the Court deems appropriate; and

(7) The Court shall notify all concerned parties within 5 days after its decision, and a

copy of the Court's order shall be served personally or by certified mail upon the complainant and respondent.

5.8 Appellate Court Jurisdiction and Procedure: The Shoshone-Bannock Court of Appeals shall have exclusive jurisdiction to review any written order entered by the Trial Court pursuant to Section 5.7 hereof. Any such order may be appealed by either the complaining or the respondent. The filing and hearing of any appeal shall be governed by the general rules of procedure for civil appeals to the Appellate Court, except that:

(1) The Commission may have the advice and assistance on appeal of a Tribal Court advocate and/or General Counsel for the Tribes;

(2) An employer, union, or individual Indian complainant may have the advice and assistance on appeal of an attorney at their own expense;

(3) Timely filing of an appeal shall automatically stay, pending final disposition thereof, those remedial aspects of the order which are specifically appealed unless the Appellate Court determines, on motion of the appellee or its own motion, that the appeal is plainly frivolous and is taken solely for the purpose of delay;

(4) The Appellate Court shall be empowered to review questions of fact and questions of law based upon the record developed in the Trial Court;

(5) The findings of fact and conclusions of law by the Trial Court shall be affirmed unless they are unsupported by substantial evidence of record or inconsistent with applicable law;

(6) The Appellate Court may also increase or modify the remedies ordered by the Trial

Court if warranted by the record and applicable law; and

(7) The Appellate Court, like the Trial Court, shall be empowered to order only those remedies specified in Section 6 hereof.

Section 6. Civil Remedies

The Trial and Appellate Courts shall be empowered to order, when appropriate, those remedies listed in Sections 6.1 to 6.3. Nothing in this Ordinance shall be intended to waive the sovereign immunity of the Tribes or any agency or official thereof, including the Commissioners, the Officer, and any Commission employees, except to the extent authorized under Sections 6.1 to 6.3.

6.1 Remedies in Compliance Plan Disputes: The Trial Court shall order pursuant to Section 4.4, and the Appellate Court may review pursuant to Section 5.8, a Compliance Plan or any revisions thereof pursuant to Sections 4.1 to 4.3 whenever the Commission and an employer are unable to agree on such Plan or revisions.

6.2 Remedies for Violation: The Trial Court may order, and the Appellate Court may review, one or more of the following remedies against any employer or union who is found to have violated this Ordinance or any rules, regulations or directives of the Commission:

(a) Denial of the right to commence or continue business within the exterior boundaries of the Reservation;

(b) Suspension of all operations within the exterior boundaries of the Reservation;

(c) Payment of back pay and damages to compensate any injured party;

(d) Summary removal of employees hired in violation of this Ordinance or any rules, regulations or directives of the Commission;

(e) Imposition of monetary civil penalties up to a maximum of $500.00 for each violation and each day during which a violation exists shall constitute a separate offense;

(f) Prohibition from engaging in any future operations on the Reservation;

(g) Mandatory employment, promotion and training of any Indians injured by the violation;

(h) Mandatory changes in procedures and policies necessary to eliminate the violation; or

(i) Any other requirement upon the employer or union deemed necessary to alleviate, eliminate or compensate for any violation.

6.3 *Remedies in Actions by Employers or Unions:* In any action initiated by an employer or union, pursuant to Section 5.5, which challenges the validity of any provision of this Ordinance or of any Commission rule, regulation or directive, the Trial Court may order, and the Appellate Court may review, one or more of the following remedies:

(a) A declaration that the challenged provision, rule, regulation or directive violates the Tribal Constitution or any applicable federal or Tribal law;

(b) An injunction barring further implementation of any of the foregoing measures declared to be invalid; or

(c) An order requiring the Commission to take those actions deemed necessary to correct any illegality or error, excluding, however, any

requirement that the Commission or the Commissioners pay any monetary compensation or damages to the injured employer or union.

Section 7. Recordkeeping Requirements and On-Site Inspections

Employers shall be required to maintain and submit upon request to the Commission any records reports or other information which the Commission deems reasonably necessary in the implementation of this Ordinance. The Commission shall have the right, after reasonable notice, to make on-site inspections during regular working hours in order to monitor any employer's compliance with this Ordinance and any rules, regulations or directives of the Commission. The Commission shall have the right to inspect and copy, after reasonable notice and at the Commission's expense, all relevant records of any employer. The Commission shall also be entitled to speak to workers and conduct any necessary investigation on the job site, consistent with business necessity of the employer and adequate notice by the Commission. All information collected by the Commission shall be kept confidential unless disclosure is judicially required during any hearing or appeal under Section 5 hereof.

Section 8. Business License Fees and Other Economic Incentives

The Commission may recommend for Council consideration the adoption of a business license fee system or any other economic incentives designed to encourage full employer compliance with this Ordinance and

thereby to promote the objective of full Indian employment on-Reservation.

Section 9. Publication of Ordinance

The Commission shall notify all employers of this Ordinance and their obligation to comply. A copy of this Ordinance, any amendment thereof, and any rules or regulations of general applicability shall be sent by the Commission to every employer located or engaged in work on the Reservation.

All Tribal Agencies responsible for issuing business permits for reservation activities or otherwise engaged in activities involving contact with prospective employers on the Reservation shall be responsible for advising such prospective employers of their obligations under this Ordinance and any rules, regulations and directives of the Commission.

All bid announcements which are for contracts or subcontracts covered by Section 4.9 hereof and which are issued by any tribal, federal, state or other private or public entity shall contain a statement that the successful bidder will be obligated to comply with this Ordinance and all rules, regulations and directives of the Commission.

Section 10. Severability

If any provision of this Ordinance, or its application to any person or circumstances, is declared invalid, the remainder of the Ordinance, or the application of the

invalid provision to other persons or circumstances, shall not be affected.

Section 11. Effective Date

This Ordinance shall be effective from the date of its approval by the Secretary or his duly authorized representative.

1868 Fort Bridger Treaty

Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians; Concluded, July 3, 1868; Ratification advised, February 16, 1869; Proclaimed, February 24, 1869.

ANDREW JOHNSON,
PRESIDENT OF THE UNITED STATES OF AMERICA,
TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Fort Bridger, in the Territory of Utah, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John B. Sanborn, S. F. Tappan, C.C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Wash-a-kie, Wau-ni-pitz, and other chiefs and headmen of the Eastern Band of Shoshonee Indians, and Tag-gee, Tay-to-ba, and other chiefs and headmen of the Bannack tribe of Indians, on the part of said band and tribe of Indians respectively, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of a Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, made the third Day of July, 1868, at Fort Bridger, Utah Territory.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and headmen of and representing the Shoshonee (eastern band) and Bannack tribes of Indians,

they being duly authorized to act in the premises:

ARTICLE I. From this day forward, peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly

examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefore.

ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind river; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl creek and along middle of channel of Owl creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the

United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties, enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE III. The United States agrees, at its own proper expense, to construct at a suitable point on the Shoshonee reservation a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular sawmill, with a grist-mill and shingle machine attached, the same to cost not more than eight thousand dollars.

ARTICLE IV. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the

same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshonee (eastern band) and Bannack Land Book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

ARTICLE VII. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children,

male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE IX. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with

them, the United States agrees to deliver at the agency house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other

purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE X. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE XI. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent any individual member of the tribe of his right to any tract of land selected by him, as provided in Article VI. of this treaty.

ARTICLE XII. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who, in the judgment of the agent, may grow the most valuable crops for the respective year.

ARTICLE XIII. It is further agreed that until such time as the agency buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U.T., and their annuities shall be delivered to them at the same place in June of each year.

N. G. TAYLOR, [SEAL.]
W.T. SHERMAN, [SEAL.]
Lt. Genl.
WM. S. HARNEY, [SEAL.]
JOHN B. SANBORN, [SEAL.]
S. F. TAPPAN, [SEAL.]
C. C. AUGUR, [SEAL.]
Bvt. Major Genl. U.S.A., Commissioners.
ALFRED H. TERRY, [SEAL.]
Brig. Gen. and Bvt. M. Gen. U.S.A.

Attest:
A.S.H. WHITE, Secretary.

Shoshonees:

WASH-A-KIE.	his+mark.
WAU-NY-PITZ.	his+mark.
TOOP-SE-PO-WOT.	his+mark.
NAR-KOK.	his+mark.
TABOONSHE-YA.	his+mark.
BAZEEL.	his+mark.
PAN-TO-SHE-GA.	his+mark.
NINNY-BITSE.	his+mark.

Bannacks:

TAGGEE.	his+mark.
TAY-TO-BA.	his+mark.
WE-RAT-ZE-WON-A-GEN.	his+mark.
COO-SHA-GAN.	his+mark.
PAN-SOOK-A-MOTSE.	his+mark.
A-WITE-ETSE.	his+mark.

Witnesses:

HENRY A. MORROW,
Lt. Col. 36th Infantry and Bvt. Col. U.S.A.,
Comdg. Ft. Bridger.
LUTHER MANPA, U.S. Indian Agent.
W. A. CARTER.
J. VAN ALLEN CARTER, Interpreter.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the sixteen day of February, one thousand eight hundred and sixty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

February 16, 1869.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Shoshonee (eastern band) and Bannack tribes of Indians, made and concluded at Fort Bridger, Utah Territory, on the third July, 1868.

Attest:

GEO. C. GORHAM,
Secretary.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the sixteenth of February, one thousand eight hundred and sixty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-third.

[SEAL.]

ANDREW JOHNSON.

By the President:

WILLIAM H. SEWARD,
Secretary of State.

Supreme Court, U.S.
FILED
FEB 25 1991
OFFICE OF THE CLERK

(2)

No. 90-1146

In The

Supreme Court of the United States

October Term, 1990

FMC, a Delaware Corporation,

Petitioner,

v.

SHOSHONE-BANNOCK TRIBES, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

JEANETTE WOLFLEY
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SHOSHONE-BANNOCK TRIBES
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February 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should the Shoshone-Bannock Tribes under the *Montana v. United States* test have civil jurisdiction over a nonIndian corporation which voluntarily entered into numerous consensual relationships with the Tribes and is located on fee land within the Tribes' reservation.

2. Should the federal courts give deference to tribal court fact finding when such tribunals are charged in the first instance to develop the factual record, evaluate and determine the federal question of tribal jurisdiction.

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No. 90-1146

In The

Supreme Court of the United States

October Term, 1990

FMC, a Delaware Corporation,

Petitioner,

v.

SHOSHONE-BANNOCK TRIBES, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

The Respondents Shoshone-Bannock Tribes, et al., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. The opinion is reported at 905 F.2d 1311 (9th Cir. 1990).

STATEMENT OF THE CASE

Respondents Shoshone-Bannock Tribes, collectively, are a federally recognized Indian tribe, which reside on

the Fort Hall Indian Reservation. Pet. App. 2. The present Reservation encompasses approximately 543,932 acres or 870 square miles. Pet. App. 2. Of the 543,932 acres, 96 percent of the land is Tribal land or held in trust by the United States for the benefit of the Tribes or its individual members. Pet. App. 2. The remaining 4 percent is held in fee by individual Tribal members and nonIndians.

In 1949, FMC (Petitioner) entered the Fort Hall Reservation for the purpose of mining the Tribes' natural resources and processing those resources on the Reservation. Petitioner built a phosphate processing facility on approximately 1,046 acres of the 4 percent of fee land within the Reservation. In 1952, Petitioner executed leases with the Tribes and individual Indians to exploit the nonrenewable phosphorus ore resource located within the Reservation. Pet. App. 3. The Petitioner's facility processes 100% of all the phosphate ore obtained from the Tribal and individual Indian owned lands. Pet. App. 3. The phosphate constitutes over 90% of the minerals used at the Petitioner's processing facility. Pet. App. 3.

Petitioner is and has always been the largest employer on the Reservation, employing 600 individuals. Pet. App. 3. In 1980, Petitioner employed 4 Indians, 0.0007% of the total 600 employees. In 1980, the Tribal unemployment rate was between 50-60%.

Pursuant to the Shoshone-Bannock Tribes' Constitution, chartered under the Indian Reorganization Act of 1934, 25 U.S.C. § 477, the governing body of the Tribes adopted a Tribal Employment Rights Ordinance (TERO) requiring that employers located on the Reservation to

give preference in employment, contracting, and subcontracting to Indians. Tribal Employment Rights Ordinance, EMPT-80-54, July 14, 1980. Pet. App. 3. The Secretary of the Interior approved the Ordinance on October 14, 1980. Pet. App. 3.

The Tribes notified Petitioner that the Tribes had enacted a TERO and that Petitioner would be required to comply with its provisions. Under Section 4.3 of the TERO, the TERO Commission may enter into a written agreement or compliance plan (TERO Agreement) with each employer to "facilitate the implementation of the hiring preference requirement." Pet. App. 69-70.

In 1981, Petitioner and the Tribes negotiated and entered into a TERO Agreement. Under the TERO Agreement, Petitioner agreed to give the TERO office an opportunity to fill all job vacancies at Petitioner's facility. If TERO was unable to fill the position within three days, then Petitioner offered the position to nonIndians. The TERO Agreement also required Petitioner to give qualified Tribally owned or Indian owned businesses preference on contracts and subcontracts, provide training positions, and notify the TERO office of suspensions and terminations of Indian employees. Petitioner complied with the TERO Agreement during 1981-1987, and continually acknowledged in writing that it was subject to the Tribes' jurisdiction.

In late 1986, the Tribes became aware that Petitioner was out of compliance with the TERO Agreement. Following several meetings with Petitioner, it became apparent that Petitioner would not correct its violations. On January 7, 1987, the Tribes wrote to Petitioner informing

it that the TERO Agreement was cancelled and that Petitioner would be required to comply with specific terms of the TERO. Eventually, the Tribes filed civil complaints against the Petitioner in Tribal court for its failure to comply with the TERO. The Petitioner filed in the federal district court challenging the Tribes' jurisdiction.

ARGUMENT

I. THE NINTH CIRCUIT FAITHFULLY APPLIED THIS COURT'S CONSENSUAL RELATIONSHIP TEST ESTABLISHED IN *MONTANA v. UNITED STATES*

In *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), this Court established a two prong test when Indian tribes retain the inherent sovereign authority to exercise "some forms of civil jurisdiction over nonIndians on their reservation." *Montana*, 450 U.S. at 565. The Court stated:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealings, contracts, leases or other arrangements . . . A tribe may also retain inherent power to exercise civil authority over the conduct of nonIndians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe . . .

450 U.S. at 564-65 (citations omitted). Most recently, the Court reaffirmed the *Montana* test in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S.

___, 109 S. Ct. 2994 (1989). The *Brendale* plurality opinion did not analyze the consensual relationship factor set forth in *Montana* because the parties agreed the factor was inapplicable to the particular facts of the case. *Brendale*, 109 S. Ct. at 3007. The Court simply applied the direct effect factor of *Montana* to the specific facts before the Court.

The Ninth Circuit's approach of applying the *Montana* test to the particular facts is precisely the approach required by this Court. The Ninth Circuit narrowly set forth the legal issue as a challenge to the Tribe's power to enforce the Tribal Employment Rights Ordinance upon a nonIndian business operating on fee land within the Reservation. Given the particular facts, the Ninth Circuit reached "only the first *Montana* factor". Pet. App. 7. The Court found,

> FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly on fee and not on Tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money involved.

Pet. 9.

These conclusions of the Ninth Circuit were compelled by the facts. The Ninth Circuit correctly found pursuant to *Montana* that there were well established "commercial dealings" between the tribes and its individual members and the Petitioner over the royalties for the phosphorus ore mined on the Reservation. Additionally, the Petitioner obtained permission to enter the Reservation through leases and rights-of-way. The Petitioner also voluntarily entered into a settlement contract or arrangement which recognized the regulatory taxing authority of the Tribes, and the employment of Tribal members. Finally, the Petitioner consented to giving preference to qualified Tribal members under the executed TERO Agreement.

Contrary to Petitioner's assertion, the Ninth Circuit did not indulge in an overbroad interpretation of the *Montana* decision. Instead, the Court undertook a narrow approach of reviewing the specific facts of the case and applying the *Montana* test to the facts. The numerous facts establishing a consensual relationship cannot and does not result in an overbroad interpretation of this Court's established principles.

The Petitioner claims the Ninth Circuit "expressly rejected any requirement that Tribal regulation based on a consensual relationship must bear some nexus to the consensual relationship in question." Pet. 8, 12. However, there is no nexus requirement. *Cardin v. DeLaCruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

Assuming *arguendo* that there is a nexus requirement, the court addressed the nexus requirement by stating, "FMC is correct that at some point the commercial relationship becomes so attentuated or stale the *Montana's*

consensual relationship requirement would not be met . . . The relationship here, however, is close enough to support the regulation." Pet. App. 9. Thus, the Court considered the nexus argument, and found that the Petitioner's close consensual commercial dealings with the Tribes and its resources, and the regulatory authority agreements relating directly to the employment practices at the Petitioner's facility processing the Tribes' resources met any nexus requirement. The nexus between Tribal regulation and the consensual relationship here is significantly enhanced by three additional factors: (1) the same parties were involved in the several agreements, leases, and commercial dealings; (2) the ore which is extracted from the Tribal mine is the same ore that is processed at the facility; and (3) all of these activities took place within the same Reservation. Indeed, the exploitation of the Tribes' non-renewable resources is sufficient in itself to meet any consensual relationship. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). This Court made clear in *Merrion*, that once a nonmember enters the reservation and conducts business with the tribe, a tribe has authority to regulate: "there is a significant territorial component to tribal power." 455 U.S. at 142.

Petitioner relies upon *Duro v. Reina*, ___ U.S. ___, 110 S. Ct. 2053 (1990), a criminal case, to argue that this Court "has been careful to limit tribal jurisdiction over nonIndians . . . " Pet. 12. Significantly, Petitioner misconstrues the Court's language which recognizes that tribal *criminal* jurisdiction is more limited than tribal *civil* jurisdiction,

> "[i]t is true that our decisions recognize broader retained tribal powers outside the criminal context. (citations omitted) . . . As distinct from

> criminal prosecution, civil authority typically involves . . . consensual relationships with the tribes or its members through commercial dealings, contracts, leases, or other arrangements. *Montana v. United States, supra,* 450 U.S. at 565, 101 S. Ct. at 1258.

Duro v. Reina, ___ U.S. ___, 110 S. Ct. at 2061. Petitioner's quoted language of *Duro* has no relevancy to this civil regulatory case.

Petitioner also asserts that the Ninth Circuit's interpretation of the consensual relationship is "contrary to the decisions of this Court and other lower courts." Pet. 8. The Petitioner cites no authority of this Court or the lower courts in support of this proposition. Indeed, this Court has never applied the consensual relationship test enunciated in *Montana.* Moreover, the well reasoned decision of the Ninth Circuit makes it unnecessary for the Court to do so in this case.

According to the Petitioner, the Ninth Circuit's decision erects a substantial obstacle to economic development on the Reservation because nonIndian landowners "must carefully eschew any commercial dealings whatsoever with either a tribe or its members to avoid becoming subject to across the board regulation . . . " Pet. 8-9. Petitioner offers no evidence for its conclusion that federal policies and the TERO have and will serve as a barrier to economic development. The TERO was adopted to address the high unemployment on the Reservation, and to thereby strengthen the Reservation. The TERO has created jobs and lessened the economic burden of the Tribes.

Moreover, the Petitioner's economic development argument has not deterred Congress or this Court from adherring to federal policy of treating tribal economic development and self-sufficiency as common goals. "[A] principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments." The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) (1988). See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)). In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), the Court discussed a number of statutes Congress enacted to promote tribal government. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court noted that the federal policy of Indian self-government includes the overriding goal of encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216. The Court further states, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenue and provide employment for their members." *Cabazon*, 480 U.S. at 219.

The TERO is consistent with the federal Indian policy of promoting tribal self-sufficiency. The federal Indian preference policy was upheld by this court in *Morton v. Mancari*, 417 U.S. 535 (1974). A unanimous Court held that the Indian preferences contained in Section 12 of the Indian Reorganization Act of 1934, 25 U.S.C. § 472 were not repealed by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e *et seq.*, which proscribed racial discrimination in employment. *Mancari*, 417 U.S. at 547. This Court recognized the objective of Indian preference as being the establishment of "machinery whereby Indian

tribes would be able to assume a greater degree of self-government, both politically and economically." 417 U.S. at 542 (footnote omitted).

The TERO enacted pursuant to the Tribes' inherent authority is a continuation of the federal Indian preference laws. TERO laws have the same objective of the federal preference laws, that is increasing Indian employment, promoting Indian enterprises, and strengthening tribal governments.[1] The result of such laws directly assists tribes in developing economic self-sufficiency, and leadership skills in Indians. The Tribes' interest in enacting an Indian preference ordinance obviously parallels the federal interest. Contrary to the petitioner's proposition, the Ninth Circuit decision will (and has) bolster the economic development of Indian reservations throughout the country.

Petitioner contends that the TERO law is a "100% Indian set aside" for employment and contracting. This assertion is totally misleading and wrong. The TERO merely establishes "the *goal* of 100% Indian employment"

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[1] The Equal Employment Opportunity Commission, Department of Housing and Urban Development, and the Department of Health and Human Services provide financial assistance for the establishment and maintenance of TERO programs. The Department of Labor through the Office of Federal Contract Compliance Programs, participated in a project to assist tribes in establishing TERO offices. The Secretary of the Interior has approved tribal ordinances, including the Shoshone-Bannock Tribes' TERO, establishing and regulating employment activities involved here.

for hiring and contracting within the Reservation boundaries. Pet. App. 70, 71. The Tribal governing body, however, recognized that this goal is not always practical and possible given the labor force and particular employer. Accordingly, the TERO provides for flexible compliance plans which the Petitioner negotiated and entered into with the Tribes. Indeed, the 1981 TERO Agreement is void of any percentages or numbers of Indians to be employed at the Petitioner's facility. Moreover, according to Petitioner, "[t]he employment agreement did not require 'preference' with regard to employment, but instead required only that FMC consider qualified Shoshone-Bannock Indian applicants in hiring." Pet. 5. The TERO is far from a mandatory "set aside" law.

The Tribal ordinance does not impose any "discriminatory burdens" or has a "discriminatory nature". Petitioner's argument otherwise is simply wrong.[2] The test is whether the Ordinance is facially discriminatory. If there

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[2] The Tribes' TERO treats members and nonIndians alike. TERO applies to all employers or persons doing business on or near the Fort Hall Reservation. Indeed, employer is defined as " . . . any person, company, contractor, subcontractor, or other entity located on or engaged in work while on the Reservation, employing five or more persons. The term 'employer' excludes federal, state and county governmental agencies, but includes tribal agencies and contractors and subcontractors of all governmental agencies." Pet. App. 63.

No distinction is made between nonIndian employers and Indian employers. The neutral application of the TERO is illustrated by the Tribes' execution of compliance agreements under TERO with eight nonIndian employers, and six Indian employers.

is a discriminatory application of the TERO, then Petitioner should allege a violation of the equal protection clause of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1990). Petitioner never alleged there was any equal protection violation until it reached the Ninth Circuit. Because the issue was not raised and preserved by the Petitioner in the Courts below, the Ninth Circuit correctly remanded to the Tribal Court to give the Petitioner an opportunity to challenge the application of the TERO under the Indian Civil Rights Act. Pet. App. 10. Petitioner, however, has chosen instead to pursue the issue before this Court. This Court based on well established precedent should disregard such late Constitutional challenges.

Finally, the Petitioner has complained to this Court that it has no representation in the political process of the Tribal government, and based on that reason, this Court should grant its petition. The Court should not engage in legislative solutions, but should leave such remedies to be shaped by Congress. It is well settled that the Congress has plenary power in Indian affairs. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). Moreover, nonIndians have representatives in Congress and Indian tribes do not. With direct representation, nonIndians can protect themselves in ways that Tribes cannot. Indeed, when Congress has seen fit to step in, it has done so. See the Indian Gaming Regulatory Act of 1988, *supra*. The Petitioner's remedy is in Congress, and its suggestion that the Court engage in such policy making should be rejected.

The Ninth Circuit's decision holding that the Shoshone-Bannock Tribes possess regulatory authority over

an established corporation doing business on the Reservation for over 40 years is reasonable and valid. The established consensual relationship between Petitioner and a sovereign is a valid exercise of jurisdiction. The Court should decline the invitation of the Petitioner to grant certiorari.

II. THE ARTICLE III CONSTITUTIONAL QUESTION PRESENTED IN THE PETITION IS FRIVOLOUS

A. The Constitutional Issue Was Not Raised Or Involved In The Decision Below

Petitioner presents the question of whether nonIndian litigants are entitled pursuant to Article III of the Constitution to *de novo* federal judicial review of a tribal court decision determining tribal jurisdiction. The Petitioner did not give the Ninth Circuit the opportunity to hear or decide this question. Indeed, the Petitioner has never presented that question to any of the lower courts. Rather, it chose to sleep on this issue for several years. Now, without any legal basis, the Petitioner asks this Court to review the issue and overturn the decision of the Ninth Circuit.

The Court has rejected such premature petitions because they border on frivolousness or seek advisory opinions. As stated, "[t]his Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals is not properly before us). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *United States v. Santana*, 427 U.S. 38, 41 n. (1976); *United States v.*

Ortiz, 422 U.S. 891, 898 (1975). Denial of the petition is particularly appropriate given the constitutional issue. Ordinarily, this Court will avoid decisions on constitutional issues if a case may be resolved on other grounds. The petition should be denied at least as to this question.

B. Federal Court Deference To The Factual Findings Of Tribal Courts Is Consistent With The Well Established Principles Of This Court

The Ninth Circuit established a deferential, clearly erroneous standard of review of factual findings of tribal courts. Petitioner's broad argument otherwise, is simply wrong. This Court has confirmed that the questions of tribal jurisdiction should be determined in the first instance by the tribal court. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Ninth Circuit relied specifically upon the *National Farmers Union* language establishing exhaustion of tribal remedies which,

> allow[s] a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . [It also will] encourage tribal courts to explain to the parties the basis for accepting jurisdiction, and will provide other courts with the benefit of their expertise in such matters in the event of further review.

National Farmers Union, 471 U.S. 856-57. Pet. App. 5. The Ninth Circuit result is consistent with the exhaustion doctrine announced by the Court, and the important federal policy of supporting tribal courts.

Petitioner overstates the deference given to tribal court decisions by the Ninth Circuit. The Ninth Circuit, following this Court's lead, limited the clearly erroneous standard to only fact finding. Pet. App. 6. On legal issues of tribal jurisdiction, the Ninth Circuit found that *de novo* review was appropriate. Pet. App. 6. The significant legal question of tribal jurisdiction over nonIndians is thus left to the federal courts. Certainly, if a federal court determines that tribes lack jurisdiction under federal law over nonIndians, the Tribes would adhere to the decision. The Petitioner's speculation otherwise is untenable.

Petitioner argues that a non-Article III tribal court's findings of fact are subject to *de novo* review by the federal courts. Petitioner's proposition is based on the exception, rather than the general rule of established law which permits agencies to hear and determine federal claims. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In only two circumstances, does clear federal law require facts to be found *de novo* by an Article III court: (1) deportation of an individual who seeks to prove citizenship, *Ng Fung Ho v. White*, 259 U.S. 276 (1922), and (2) a traditional state common law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 92 (1982) (Burger, C.J., dissenting). This particular case does not fall within the two specific exceptions of deportation and bankruptcy. The decision below was a pure and simple case of tribal jurisdiction, a federal question.

Petitioner relies upon *Crowell v. Benson*, 285 U.S. 22 (1932), to support its *de novo* review of facting finding argument. The *Crowell* case required *de novo* review of the question whether an injury occurred upon the navigable waters of the United States when workmen's compensation was sought under the Longshoreman's and Harbor Workers' Act. The holding was quite narrow and has never been expanded. This Court has recently noted:

> "*Crowell's* precise holding, with respect to the review of 'jurisdictional' and 'constitutional' facts that arise within the ordinary administrative proceedings, has been undermined in later cases . . . But the general principle of *Crowell* – distinguishing between congressionally created rights and constitutionally recognized rights – remains valid . . . " *Northern Pipeline Co.*, 458 U.S. 50, 82, n. 34 (1982).

Moreover, as early as 1946, Justice Frankfurter stated, "one had supposed that the doctrine had earned a deserved repose." *Estep v. United States*, 327 U.S. 114, 142 (1946). *Crowell* has thus been undermined by the subsequent decisions of this Court. Accordingly, *Crowell* is not controlling to require *de novo* review of findings of fact of a tribal court created by a sovereign tribal government.

CONCLUSION

In light of the Ninth Circuit's strict application of the *Montana* consensual relationship factor to the unique facts of this case, there is no substance to Petitioner's request that certiorari be granted in this matter. Additionally, the presentation of the constitutional issue to this Court is

inappropriate. Respondents pray that Petitioner's Writ Of Certiorari be summarily denied.

Respectfully submitted,

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